No. 02-16534

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

OAKLAND CANNABIS BUYERS' COOPERATIVE and JEFFREY JONES,
Defendants-Appellants.

Appeal from Entry of Final Judgment by the United States District Court
for the Northern District of California
Case No. C 98-00088 CRB
entered on July 29, 2002, by Judge Charles R. Breyer.

APPELLANTS' OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Oakland Cannabis Buyers' Cooperative ("OCBC") submits the following Corporate Disclosure Statement as required by Federal Rule of Appellate Procedure 26.1.

OCBC, a California corporation, has no parent companies, subsidiaries, or affiliates.

STATEMENT OF JURISDICTION

On January 9, 1998, the United States government filed a civil complaint against Appellants alleging violations of the Controlled Substances Act (21 U.S.C. §§ 841(a), 846, and 856). Excerpts of Record ("ER") 1-8. The district court had original jurisdiction pursuant to 28 U.S.C. §§ 1331, 1345, and 1355(a).

On May 3, 2002, the district court entered summary judgment against Appellants and, on June 10, 2002, issued a permanent injunction. ER 4404-15, 4433-41, 4442-47. On August 1, 2002, after entry of partial judgment, Appellants filed a timely notice of appeal pursuant to Federal Rule of Appellate Procedure 4(a)(1). ER 4452-4521. Appellants appeal the entry of summary judgment and permanent injunction and all non-collateral, interlocutory orders pursuant to Federal Rule of Civil Procedure 54(b) and 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Whether the district court erred when, under the purported authority of the federal Controlled Substances Act, it enjoined Appellants' wholly intrastate distribution of medical cannabis, when that distribution was undertaken pursuant to state and local laws designed to protect the public health and welfare of California citizens, and

a. where the injunction exceeded the powers of Congress under the Commerce Clause or Necessary and Proper Clause because the government failed to establish that Appellants' economic activities have a substantial effect on interstate commerce, and because the injunction improperly applied, in part, to entirely non-economic activities; and

b. where the injunction improperly infringed upon the police powers of the State of California to protect the health and safety of its citizens; and

c. where the injunction improperly infringed upon fundamental rights, by depriving seriously ill patients of an effective means to ameliorate their debilitating pain, blindness, starvation and possible death, and the government failed to offer any legitimate justification for depriving these patients of this necessary medicine.

2. Whether the district court erred when it rejected the claim of Appellants, duly authorized officers of the City of Oakland, to statutory immunity when Appellants were lawfully engaged in enforcing laws related to controlled substances, as required by the statute granting such immunity.

3. Whether the district court erred when it granted the government's motions for summary judgment and permanent injunction when the government failed to meet its burden of proof and Appellants established legally valid defenses to both motions.

4. Whether the district court abused its discretion when it granted the government's motion for summary judgment and refused to permit Appellants to obtain discovery to be used in opposition to that motion.

INTRODUCTION

Acting under the authority of the federal Controlled Substances Act ("the CSA"), the government filed a civil complaint for injunctive relief, seeking to prevent Appellants from providing medical cannabis to seriously ill patients — an activity specifically sanctioned by California law. Under the purported authority of the CSA, the district court refused to dismiss the complaint, issued a preliminary injunction, and ultimately entered an order permanently enjoining Appellants from engaging in these state-authorized activities. In acceding to the government's demands for injunctive relief, the district court abdicated its duty to ensure that the CSA, and any federal statute interfering with the interests of state and local

governments, be interpreted in a manner that is consistent with the limitations on federal authority set forth in the Constitution. The constitutional issues raised by the district court's actions in this case extend well beyond the narrow issue of medical cannabis. At stake in these proceedings is whether the federal government may exercise power in derogation of the Constitution, unrestrained by any recognition of the constitutionally protected sovereignty and autonomy of state and local governments or the fundamental rights of American citizens. To uphold the district court's actions in this case would weaken each of these foundations of our Republic.

FACTUAL SUMMARY

A. California Proposition 215 And The Oakland Cannabis Buyers' Cooperative

On November 5, 1996, California voters passed an initiative known as the Compassionate Use Act of 1996 ("Compassionate Use Act"). *See* Cal. Health & Safety Code § 11362.5. The primary purposes of the Compassionate Use Act are:

- To ensure that seriously ill Californians have *the right* to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief[;]
- To ensure that patients and their primary caregivers who obtain and use marijuana for medical purposes upon the recommendation of a physician are not subject to criminal prosecution or sanction[; and]
- To encourage the federal and state governments to implement a plan to provide for the safe and affordable distribution of marijuana to all patients in medical need of marijuana.

Id. (emphasis added). At least eight other states (Alaska, Arizona, Colorado, Hawaii, Maine, Nevada, Oregon, and Washington) have passed similar laws. *See* Alaska Stat. Ann. §§ 11.71.090, 17.37.010 to 17.37.080; Ariz. Rev. Stat.

§ 13-3412.01; Colo. Const. art. XVIII, § 14; Haw. Rev. Stat. §§ 329-121 to 329-128; Me. Rev. Stat. Ann. tit. 22, § 2383-B5; Nev. Const. art. 4, § 38; Or. Rev. Stat. §§ 475.300 to 475.346; Wash. Rev. Code §§ 69.51A.005 to 69.51A.902.

Appellant Oakland Cannabis Buyers' Cooperative ("OCBC"), a California cooperative corporation, was formed to provide safe and legal access to medical cannabis to patient-members who have a valid physician's recommendation. ER 2988-89. It also provides support services and education concerning medical cannabis to its members. ER 2946. Appellant Jeffrey Jones is the Executive Director of OCBC. ER 1995.

Appellants' patient-members face debilitating and/or terminal illnesses, such as cancer, AIDS and/or HIV infection, multiple sclerosis, glaucoma, or crippling arthritis. ER 2946-47. Without medical cannabis these patient-members face loss of life (ER 1901-02, 2955-57, 3753-54), starvation (ER 2970-71, 3045-46), and blindness (ER 3049).

Since the inception of this litigation in 1998, over 25 patient-members have died more painful and agonizing deaths as a direct result of deprivation of medical cannabis. ER 3753-54. If the permanent injunction remains in place, many more will suffer needlessly. ER 3754; *see generally* 1827-1904.

B. The Federal Government's Civil Actions To Enforce The CSA And The Preliminary Injunction

Claiming that the activities of medical cannabis cooperatives violated federal criminal law (21 U.S.C. § 801 *et seq.*), on January 9, 1998, the government filed civil complaints seeking a declaratory judgment and preliminary and permanent injunctive relief against six California cannabis dispensaries, including OCBC. ER 1-31. The government's invocation of a civil injunctive procedure to address alleged violations of federal criminal laws was, in the words of the district court, "rare." ER 674.

On February 27, 1998, Appellants moved to dismiss the complaint for lack of jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1). ER 167-96. Appellants argued, among other things, that the district court had no jurisdiction to entertain the government's complaints because the government lacked the authority to regulate Appellants' conduct under the Commerce Clause. The district court denied the motion to dismiss in its entirety in an order dated May 19, 1998, which incorporated by reference a Memorandum and Order dated May 13, 1998. *United States v. Cannabis Cultivators Club* ("*CCC*"), 5 F. Supp. 2d 1086 (N.D. Cal. 1998); ER 695.

Focusing on the purported "effect" on interstate commerce of the distribution of medical cannabis — without regard to whether medical cannabis falls outside the traditional for-profit drug trafficking targeted by federal law — the district court rejected Appellants' Commerce Clause arguments. ER 664. The district court ruled that "[m]edical marijuana may be grown locally, or out of the state or country, and there is nothing in the nature of medical marijuana that limits it to intrastate cultivation." ER 664.

After finding in its May 13 Order that the government was likely to succeed on the merits, presuming irreparable harm to the government, but failing to consider the public interest, on May 19, 1998, the district court issued a Preliminary Injunction Order enjoining OCBC and the other named dispensaries from "engaging in the manufacture or distribution of marijuana, or the possession of marijuana with the intent to manufacture and distribute marijuana, in violation of 21 U.S.C. § 841(a)(1)." ER 696-97.

C. September 3, 1998 Order Denying Appellants' Motion To Dismiss For Failure To State A Claim

On July 28, 1998, the Oakland City Council unanimously passed Ordinance No. 12076 — An Ordinance of the City of Oakland Adding Chapter 8.42 to the

Oakland Municipal Code Pertaining to Medical Cannabis (the "Ordinance"). ER 928-32. The Ordinance was designed to further the purposes of the Compassionate Use Act, protect the life and liberty interests of citizens needing medical cannabis, and ensure that seriously ill persons with a doctor's recommendation for cannabis would be able to obtain and use cannabis for medical purposes. ER 928.

The Oakland Ordinance establishes a Medical Cannabis Distribution Program. ER 929-30. Pursuant to the Ordinance, on August 11, 1998, the Oakland City Manager designated OCBC as a medical cannabis provider association, under the Medical Cannabis Program. ER 933. The Ordinance deems designated providers, such as OCBC, and its agents, employees, and directors, to be officers of the City of Oakland. ER 929. The Ordinance also provides "immunity to medical cannabis provider associations pursuant to Section 885(d) of Title 21 of the United States Code . . . ." ER 930.[1]

After the City of Oakland passed the Ordinance immunizing OCBC, Appellants moved the district court for a second time to dismiss the complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). ER 852-71. The motion was based on two grounds: (1) immunity under 21 U.S.C. § 885(d) (ER 865-67, 1019-26); and (2) violation of the substantive due process rights of patient-members under the Fifth and Ninth Amendments to the United States Constitution (ER 867-70, 1026). The district court denied the motion in an order dated September 3, 1998. ER 1171-75.

On the issue of statutory immunity, the district court found that the Ordinance violated the CSA, to the extent that it allows distribution of cannabis. ER 1172-75. According to the district court, the distribution of medical cannabis

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[1] Section 885(d) immunizes from civil and criminal liability duly authorized state and local government officers who are engaged in the enforcement of laws relating to controlled substances. 21 U.S.C. § 885(d).

does not comply with Section 885(d)'s requirement that the officer be "'lawfully engaged in the enforcement of any law or municipal ordinance related to controlled substances.'" ER 1173. The district court further held that any immunity would shield Appellants only from civil or criminal liability, and not from the injunctive relief sought by the government. ER 1174.

The district court summarily dismissed Appellants' substantive due process arguments referencing the May 13 Order. ER 1172. In its May 13 Order, the district court held that, "on the record presently before the court, defendants have not established that the right to such treatment is 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" ER 673 (citation omitted). Despite this pronouncement, the district court explicitly refused to "rul[e] as a matter of law that no such right [to medical cannabis] exists." ER 673.

D. The Contempt Order And Appellants' Motion To Modify The Preliminary Injunction

On July 6, 1998, the government moved for an Order to Show Cause why Appellants should not be held in contempt for violation of the preliminary injunction. ER 705-77. Appellants responded to the Order to Show Cause with extensive evidence in the form of declarations from patient-members, doctors, experts, and OCBC employees to establish Appellants' defenses. ER 1178-1480. The government then moved *in limine* to exclude all of Appellants' defenses. ER 1590-1620. On October 13, 1998, the district court held Appellants in contempt and simultaneously excluded all of Appellants' defenses *in limine*. ER 1814-26. The district court also ordered modification of the injunction to permit the U.S. Marshal to seize Appellants' offices. ER 1812-13.

On October 15, 1998, two days after they were held in contempt, Appellants moved the district court to modify the preliminary injunction. ER 1905-13. Appellants requested that the injunction be modified to permit distribution of

cannabis to the limited number of patients who could demonstrate medical necessity under the standard set forth in *United States v. Aguilar*, 883 F.2d 662 (9th Cir. 1989). ER 1909-10. The district court denied the motion. ER 1952-53.

On October 29, 1998, Appellants applied to the district court *ex parte* for an order allowing OCBC to reopen for educational and political purposes. ER 1957-94. On October 30, 1998, after Appellants represented that they would comply with the injunction (ER 1995-97), the district court allowed OCBC to reopen as requested. ER 2016-18.

E. This Court's September 13, 1999 Decision

Appellants appealed to this Court the district court's denial of: (1) Appellants' motion to dismiss on immunity and constitutional grounds; (2) the October 13 Order holding Appellants in contempt and excluding their defenses *in limine*; and (3) the motion to modify the preliminary injunction to accommodate patient-members' medical necessity. ER 1809-11, 1916-43.

On September 13, 1999, this Court issued a *per curiam* opinion reversing the denial of the motion to modify and remanding the case to the district court. *United States v. Oakland Cannabis Buyers' Coop.* ("*OCBC*"), 190 F.3d 1109, 1115 (9th Cir. 1999), *rev'd*, 532 U.S. 483 (2001). This Court held that "the district court abused its discretion by refusing to modify the injunction to permit cannabis distribution to patients for whom it is a medical necessity." *Id.* at 1113. In so holding, this Court found that: (1) the district court could take into account a legally cognizable defense of necessity in considering the proposed modification; (2) in exercising its equitable discretion, the court must expressly consider the public interest; and (3) the record before the district court justified the proposed modification. *Id.* at 1114-15.

Finally, this Court also rejected two of Appellants' grounds for appeal. First, this Court held that it lacked jurisdiction at that time over the district court's

denial of Appellants' motion to dismiss. *Id.* at 1112. Second, this Court found that the contempt order was moot, because the contempt had been purged. *Id.*

F. The District Court's Order Modifying The Preliminary Injunction

On remand to the district court on May 30, 2000, Appellants renewed their motion to modify or dissolve the preliminary injunction. ER 2050-2637. The district court granted Appellants' motion to modify the injunction in an order dated July 17, 2000. ER 2868-73. In a separate order dated July 17, 2000, the district court issued an Amended Preliminary Injunction Order, which included an exception for medical necessity. ER 2874-78.

G. The Supreme Court's Reversal And Remand

On November 27, 2000, the Supreme Court granted the government's petition for writ of *certiorari* to review this Court's September 13, 1999 opinion. On May 14, 2001, the United States Supreme Court reversed this Court's decision and remanded the case for further proceedings. *United States v. Oakland Cannabis Buyers' Coop.* ("*OCBC*"), 532 U.S. 483 (2001). The Supreme Court found that "a medical necessity exception for marijuana is at odds with the terms of the CSA." *Id.* at 491. In so ruling, the Supreme Court upheld Appellants' contention that the district court has discretion when faced with the government's request for an injunction:

> The Cooperative is also correct that the District Court in this case had discretion. The CSA vests district courts with jurisdiction to enjoin violations of the Act, 21 U.S.C. § 882(a). But a "grant of jurisdiction to issue [equitable relief] hardly suggests an absolute duty to do so under any and all circumstances." *Hecht, supra,* at 329 (emphasis omitted). *Because the District Court's use of equitable power is not textually required by any "clear and valid legislative command," the Court did not have to issue an injunction.*

* * *

> [W]ith respect to the CSA, criminal enforcement is an alternative, and indeed the customary, means of ensuring compliance with the statute. *Congress' resolution of the policy issues can be (and usually is) upheld without an injunction.*

OCBC, 532 U.S. at 496-97 (emphasis added).

Second, the Supreme Court recognized that in determining whether to issue an injunction, the district court *must* consider the effect of the injunction on the public interest and on the parties:

> Consequently, when a court of equity exercises its discretion, it may not consider the advantages and disadvantages of nonenforcement of the statute, but only the advantages and disadvantages of "employing the extraordinary remedy of injunction," *Romero-Barcelo*, 456 U.S. at 311, over the other available methods of enforcement. *Cf. id.* at 316 (referring to "discretion to rely on remedies other than an immediate prohibiting injunction"). *To the extent the district court considers the public interest and conveniences of the parties, the court is limited to evaluating how such interest and conveniences are affected by the selection of an injunction over other enforcement mechanisms.*

Id. at 498 (emphasis added).

Third, three justices also recognized that courts must give deference to the State's interests:

> The overbroad language of the Court's opinion is especially unfortunate given the importance of showing respect for the sovereign states that comprise our Federal Union. That respect imposes a duty on federal courts, whenever possible, to avoid or minimize conflict between federal and state law, particularly in situations in which the citizens of a state have chosen to "serve as a laboratory" in the trial of "novel social and economic experiments without risk to the rest of the country."

Id. at 502 (Stevens, J. concurring) (citation omitted).

Finally, the Supreme Court expressly left open the constitutional issues raised by Appellants, stating that, "[b]ecause the Court of Appeals did not address these claims, we decline to do so in the first instance." *Id.* at 494.

H. Proceedings In The District Court After Remand

On December 4, 2001, this Court remanded the case to the district court for "proceedings consistent with the United States Supreme Court opinion." ER 4083.

1. January 7, 2002 Motion to Dissolve or Modify the Preliminary Injunction

On January 7, 2002, Appellants moved to dissolve or modify the preliminary injunction order. ER 2888-3157. Appellants argued that under the circumstances of this case, the CSA is an unconstitutional exercise of Congressional power under the Commerce and Necessary and Proper clauses of the United States Constitution and because it violates fundamental rights. ER 2888-3157.

2. May 3, 2002 Order Granting Summary Judgment

On January 25, 2002, the government moved for summary judgment and permanent injunctive relief. ER 3171-3218. The district court held a hearing on both Appellants' and the government's motions on April 19, 2002. ER 4361-4403. During the hearing, the district court demanded that defense counsel "represent to the court that the defendants in this case will not dispense marijuana" in the future. ER 4374.

On May 3, 2002, the district court granted the government's motion for summary judgment. ER 4404-15. Notably, the Order requested Appellants "to file further submissions with the Court concerning the likelihood of future violations of the Act, and in particular, *whether there is a threat that defendants, or any of them, will resume their distribution activity if the Court does not enter a permanent injunction*." ER 4415 (emphasis added). On May 22, 2002, Appellants filed formal objections to the procedure on the grounds that it invaded the attorney-client privilege and violated Jeffrey Jones's Fifth Amendment privilege against self-incrimination. ER 4416-21.

Without hearing argument on the serious constitutional issues raised by Appellants, the district court perfunctorily rejected Appellants' Commerce Clause objections. ER 4413-15. Without addressing Appellants' analysis or that of the Supreme Court, the district court merely distinguished the present case from *United States v. Morrison*, 529 U.S. 598 (2000), on the ground that the activity enjoined was "economic," thereby ignoring the Supreme Court's articulation of a justiciable substantial effects analysis of wholly intrastate activities under the Commerce Clause. ER 4414. The district court failed even to mention Appellants' other constitutional objections to the injunction. ER 4404-15.

The district court found the factual record sufficient to grant summary judgment and overruled Appellants' evidentiary objections. ER 4409. The district court also rejected Appellants' motion for further discovery under Federal Rule of Civil Procedure 56(f) (ER 4410), and summarily rejected all of Appellants' defenses. ER 4410-12.

3. June 10, 2002 Order Granting Permanent Injunction

On June 10, 2002, the district court permanently enjoined Appellants from possessing with intent to distribute, manufacturing, or distributing medical cannabis. ER 4433-47. The Order identified one threshold issue: "[W]hether the government has demonstrated a threat of future unlawful conduct. If not, there is no need for the Court to exercise its extraordinary equitable powers for there is no conduct to deter." ER 4435. Relying upon Appellants' failure to provide the court with declarations affirming that they would not distribute medical cannabis in the future, the district court found that the government had met its burden. ER 4435. The Order did not address either of Appellants' formally lodged objections to this portion of the May 3 Order. ER 4433-41. On August 1, 2002, Appellants filed a

timely notice of appeal after the district court granted their motion for entry of partial judgment on July 29, 2002. ER 4448-4521.[2]

STANDARDS OF REVIEW

A. The District Court's Refusal To Modify Or Dissolve The Preliminary Injunction

The district court's implicit denial of Appellants' January 7, 2002 motion to modify or dissolve the preliminary injunction is reviewed for an abuse of discretion. *See Tracer Research Corp. v. Nat'l Envtl. Servs. Co.*, 42 F.3d 1292, 1294 (9th Cir. 1994); *ACF Indus. Inc. v. Calif. State Bd. of Equalization*, 42 F.3d 1286, 1289 (9th Cir. 1994). The district court ruling on Appellants' challenge to the constitutionality of the CSA, a federal statute, is reviewed *de novo*. *See Free Speech Coalition v. Reno*, 198 F.3d 1083, 1090 (9th Cir. 1999), *aff'd sub nom. Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002).[3]

B. The Order Granting Summary Judgment

The district court's grant of summary judgment in favor of the government is reviewed by this Court *de novo*. *See Delta Sav. Bank v. United States*, 265 F.3d 1017, 1021 (9th Cir. 2001), *cert. denied sub nom. Kim v. United States*, 534 U.S. 1082 (2002). The constitutional issues raised by the summary judgment order are reviewed *de novo*. *See Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 435-436 (2001) (interpretation of the federal Constitution); *Alexander v. Glickman*, 139 F.3d 733, 735 (9th Cir. 1998) (interpretation of a federal statute).

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[2] The motion for entry of partial judgment was necessitated by the presence of a Counterclaim-in-Intervention that had not yet been dismissed. ER 778-851, 953-69, 1033-47, 1165, 1713-33, 2019-24, 2032-49, 4448-51.

[3] For purposes of appeal, Appellants assume that the preliminary injunction is superseded by the permanent injunction. *See Burbank-Glendale-Pasadena Airport Auth. v. City of Los Angeles*, 979 F.2d 1338, 1340 n.1 (9th Cir. 1992).

Appellants also challenge the district court's rejection of their defenses, including their substantive due process, statutory immunity, and "joint user" defenses. All of Appellants' defenses involve the construction of federal law, which is reviewed *de novo* as a question of law. *See Cooper Indus.*, 532 U.S. at 435-36 (interpretation of the federal Constitution); *United States v. 2.6 Acres of Land*, 251 F.3d 809, 811 (9th Cir. 2001) (application of a federal statute); *Alexander*, 139 F.3d at 735 (interpretation of a federal statute); *Confederated Tribes of Siletz Indians of Oregon v. United States*, 110 F.3d 688, 693 (9th Cir. 1997) (constitutionality of a federal statute).

The district court's ruling on Appellants' evidentiary objections and its denial of Appellants' motion for additional discovery are reviewed for an abuse of discretion. *See Domingo v. T.K.*, 289 F.3d 600, 605 (9th Cir. 2002); *Chance v. Pac-Tel Teletrac Inc.*, 242 F.3d 1151, 1161 n.6 (9th Cir. 2001).

C. The Order Entering The Permanent Injunction

The grant of permanent injunctive relief by the district court is reviewed for an abuse of discretion. *See Lavine v. Blaine Sch. Dist.*, 257 F.3d 981, 987 (9th Cir. 2001), *cert. denied*, 2002 U.S. LEXIS 4948 (2002). The denial of Appellants' affirmative defenses is reviewed for an abuse of discretion. *See 389 Orange St. Partners v. Arnold*, 179 F.3d 656, 664 (9th Cir. 1999). The constitutional issues raised by entry of the permanent injunction must be reviewed *de novo*. *See Cooper Indus.*, 532 U.S. at 435-436 (interpretation of the federal Constitution); *2.6 Acres of Land*, 251 F.3d at 811 (application of a federal statute); *Alexander*, 139 F.3d at 735 (interpretation of a federal statute); *Confederated Tribes*, 110 F.3d at 693 (constitutionality of a federal statute).

D. The District Court's Refusal To Dismiss For Lack Of Jurisdiction

This Court reviews denials of a motion to dismiss for lack of jurisdiction *de novo*. *See McLachlan v. Bell*, 261 F.3d 908, 910 (9th Cir. 2001). The district court's ruling on the constitutionality of the CSA, a federal statute, is reviewed *de novo*. *See Free Speech Coalition*, 198 F.3d at 1090.

E. The District Court's Refusal To Dismiss For Failure To State A Claim

The district court's order denying a motion to dismiss for failure to state a claim is reviewed *de novo*. *See McNamara-Blad v. Ass'n of Professional Flight Attendants*, 275 F.3d 1165, 1169 (9th Cir. 2002). The district court's ruling on Appellants' challenge to the constitutionality of the CSA, a federal statute, is reviewed *de novo*. *See Free Speech Coalition*, 198 F.3d at 1090. The district court's denial of Appellants' immunity defense, which involves interpretation and application of a federal statute, 21 U.S.C. § 885(d), is likewise reviewed *de novo*. *2.6 Acres of Land*, 251 F.3d at 811; *Alexander*, 139 F.3d at 735.

SUMMARY OF THE ARGUMENT

Appellants appeal five separate dispositive motions in which the district court committed reversible error by finding the CSA constitutional as applied to the wholly intrastate cultivation and distribution of medical cannabis to seriously ill Californians pursuant to state law. The orders denying the motions to dismiss for lack of jurisdiction and failure to state a claim, denying the motion to modify or dissolve the preliminary injunction, as well as the orders entering summary judgment and the permanent injunction all hinge upon the district court's erroneous application of United States Supreme Court precedent governing issues of federalism under the Constitution.

The power of Congress to reach the activities enjoined here can only rest on the Commerce Clause or the Necessary and Proper Clause. Under the Commerce Clause, Congress has power only over interstate economic activities. Distribution of cannabis for medical purposes under California law is a wholly *intrastate* activity — a California physician must recommend the medication, which is cultivated in California, distributed in California, and consumed in California by eligible California patients. Moreover, OCBC is a not-for-profit organization intended to facilitate access to medication for the critically ill, which is a *non-economic* intrastate activity beyond the regulatory powers of Congress.

While Congress has no power over wholly intrastate non-economic activity, it may reach wholly intrastate activities under the Necessary and Proper Clause *only* if such regulations are shown to be "necessary" to effectuate its power over interstate commerce. Specifically, either Congress or the government must show why wholly intrastate cultivation and distribution of medical cannabis "substantially affects" interstate commerce. No such showing was made in this case. Further, such regulations over intrastate economic activities must be "proper": they must not improperly intrude upon traditional areas of state governance under the Tenth Amendment. Finally, the powers of Congress over either interstate or intrastate economic activity must not be exercised in a manner that "improperly" violates the fundamental rights of the individual patient-members under the Fifth and Ninth Amendments, as the injunction in this case plainly does.

For all of these reasons, the district court should have dismissed the action, or should have modified or dissolved the injunction. For these reasons and because the government failed to establish a legal entitlement to summary judgment or to a permanent injunction, the district court committed reversible error when it granted these motions.

ARGUMENT

I. THE PERMANENT INJUNCTION EXCEEDS THE POWERS OF CONGRESS UNDER THE COMMERCE CLAUSE

A. Under The Purported Authority Of The CSA The District Court Has Enjoined Conduct That Is Beyond The Commerce Power Of Congress To Prohibit

On three separate occasions, the district court addressed the constitutionality of the injunction sought by the government.[4] On each occasion, the district court ignored or failed correctly to apply the Supreme Court's jurisprudence regarding the scope of the Commerce Clause.

First, the district court incorrectly applied the Supreme Court's recent Commerce Clause jurisprudence in its Memorandum and Order dated May 13, 1998. ER 661-64. Focusing on Congressional findings that "intrastate manufacture, distribution, and possession of controlled substances" have a substantial effect on interstate commerce, the district court found the statute constitutional as applied. ER 662-64. The court based its conclusion primarily on its view that only Congress may define a class of activities for purposes of an "as applied" challenge to a federal statute, and that grouping the non-profit, wholly intrastate medical cannabis with illicit drug trafficking of any and all controlled substances was appropriate. ER 664. The district court then reasoned that this "class" was within the reach of Congressional power, due to the aforementioned "substantial effect"

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[4] These orders were: the May 19, 1998 order denying Appellants' motion to dismiss for lack of jurisdiction based on the Commerce Clause (which incorporates by reference the court's analysis in its May 13, 1998 order); the September 3, 1998 Order denying Appellants' motion to dismiss for failure to state a claim based on substantive due process; and the May 3, 2002 order after remand from the Supreme Court, which implicitly denied Appellants' motion to modify or dissolve the preliminary injunction on constitutional grounds, granted the government's motion for summary judgment, and led to entry of the permanent injunction on June 10, 2002. ER 695, 1171-79, 4404-15, 4433-41.

of illicit trafficking in controlled substances generally on interstate commerce. ER 664.

Second, in its order dated May 3, 2002, the district court shifted its focus slightly to the "economic" nature of Appellants' activities. Again, the district court improperly labeled Appellants' activities "drug trafficking," which it held was a "commercial activity" under Ninth Circuit precedent. ER 4414.

Third, the district court failed to address other serious constitutional objections to the injunction made by Appellants, including the implications of the Necessary and Proper Clause and of the Fifth, Ninth, and Tenth Amendments. ER 652-78, 4413-15. The district court rejected Appellants' constitutional arguments in its September 3, 1998 order denying Appellants' motion to dismiss, and in its May 3, 2002 order granting the government's motion for summary judgment. ER 1172, 4413-15. The district court also implicitly rejected these arguments when it failed to grant Appellants' January 7, 2002 motion to modify or dissolve the existing injunction.

For all of these reasons, the district court committed reversible error. These errors resulted in the grant of the government's motion for summary judgment and in the entry of a permanent injunction that is plainly unconstitutional.

1. Appellants' Activities Are Wholly Intrastate and Therefore Outside the Power of Congress to Regulate Commerce "Among the Several States"

To determine whether the district court erred in concluding that the injunction does not exceed Congress's authority under the Commerce Clause, this Court must first consider whether Appellants' activities even lie within the reach of the enumerated or implied powers of Congress. If the activities do not, this Court need not consider other issues, such as whether the injunction violates principles of state sovereignty or fundamental rights. However, if the injunction does exceed the

powers of Congress, then it is likely also to infringe upon the sovereign powers of the states, the fundamental rights of citizens, or both.

"We start with first principles. The Constitution creates a Federal Government of enumerated powers." *United States v. Lopez*, 514 U.S. 549, 552 (1995). For this reason, Congress has no general police powers. *See id.* at 566 ("The Constitution . . . withhold[s] from Congress a plenary police power that would authorize enactment of every type of legislation"). As both Article I[5] and the Tenth Amendment[6] make plain, the Constitution confines Congress to an enumeration of powers and execution of those powers by means of laws that are necessary and proper. *See McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819) ("This government is acknowledged by all to be one of enumerated powers."). As explained in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803):

> The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction, between a government with limited and unlimited powers, is abolished, if those limits do not confine the persons on whom they are imposed . . . .

Id. at 176.

In this case, the district court prohibited activity that it assumed takes place wholly within the borders of the State of California. ER 664. The activity consists of the acquisition of cannabis by seriously ill persons on recommendation of physicians licensed by the State of California, and the intrastate cultivation and

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[5] *See* U.S. CONST. art. I, § 1 ("All legislative Powers *herein granted* shall be vested in Congress.") (emphasis added).

[6] "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

distribution of cannabis for this limited purpose by an organization authorized and regulated by a local municipality pursuant to California law.

In prohibiting Appellants' wholly intrastate activities, the district court failed to give due consideration to the constitutional limits on the government's powers to regulate intrastate activities. These wholly intrastate activities are beyond the power of Congress "to regulate Commerce . . . among the several States." U.S. CONST. art. I, § 8, cl. 3; *see also* The Federalist No. 42, at 235-36 (James Madison) (Clinton Rossiter ed., 1999) (referring to the power "to regulate . . . between State and State"). If Article I had included the power to regulate wholly intrastate commerce, it would simply have read "Congress shall have power to regulate commerce." The only reason for the tripartite breakdown[7] specified was to exclude the power to regulate wholly intrastate commerce. As Chief Justice Marshall explained in *Gibbons v. Ogden*: "The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, *must be the exclusively internal commerce of a State* . . . . The completely internal commerce of a State, then, may be considered as reserved for the State itself." 22 U.S. (9 Wheat) 1, 195 (1824) (emphasis added). In sum, protecting wholly intrastate commerce from the reach of Congress is a constitutional imperative in our federal system.

In *Champion v. Ames,* 188 U.S. 321 (1903), the Supreme Court first decided that the power to regulate commerce among the States included a limited power to prohibit certain activities. The Court insisted, however, that this extension of Congressional power "does not assume to interfere with traffic or commerce . . .

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[7] Article I, section 8 permits Congress to regulate "Commerce with foreign Nations, and among the several States, and with the Indian tribes." U.S. CONST. art. I, § 8, cl. 3.

carried on *exclusively* within the limits of any State, but has in view only commerce of that kind among the several States." *Id.* at 357 (emphasis added).[8]

The government did not dispute below that Appellants' activities are wholly intrastate. Unless the Congressional power the injunction seeks to enforce can be justified under some other enumerated power or under Congress's implied powers under the Necessary and Proper Clause, it is unconstitutional. As Justice Thomas has concluded, "the Federal government's authority under the Commerce Clause, which merely allocates to Congress the power 'to regulate Commerce . . . among the several States,' does not extend to the regulation of wholly intrastate point-of-sale transactions." *Printz v. United States*, 521 U.S. 898, 937 (1997) (Thomas, J., concurring).

2. The Government Has Not Established a Legal Justification for Reaching This Wholly Intrastate Activity Under the Necessary and Proper Clause

Congress's power over commerce "among the several states" clearly does not of itself reach the conduct enjoined by the district court. The only argument on behalf of the injunction's constitutionality is that the injunction is justified under what the Supreme Court has called "the last, best hope of those who defend *ultra vires* Congressional action, the Necessary and Proper Clause." *Id.* at 923. Indeed, the seminal modern cases commonly thought to expand the Commerce Power of Congress rested crucially on the power of Congress to "make all Laws which shall

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[8] That Congress lacks the power to reach wholly intrastate commerce is affirmed by the need to ratify the Eighteenth Amendment to prohibit the intrastate "manufacture, sale, or transportation of intoxicating liquors." U.S. CONST. amend. XVIII (repealed). It is affirmed as well by Section 1 of the Twenty-First Amendment, repealing the Eighteenth, which would have no purpose or effect if Congress could reach the same intrastate commerce under its power to regulate commerce among the States. Together with the first sentence of Article I and with the Tenth Amendment, the Twenty-First Amendment confirms that Congress does not have a plenary power over wholly intrastate commerce.

be *necessary and proper* for carrying into Execution the foregoing Powers . . . ." U.S. CONST. art. I, § 8 (emphasis added); *see New York v. United States*, 505 U.S. 144, 158 (1992) ("The Court's broad construction of Congress's power under the Commerce and Spending Clauses has of course been guided, as it has with respect to Congress's power generally, by the Constitution's Necessary and Proper Clause . . . .").

It has long been recognized, however, that the Necessary and Proper Clause does not render the enumeration of powers redundant or superfluous. As James Madison explained to the first Congress: "Whatever meaning this clause may have, none can be admitted, that would give an unlimited discretion to Congress. Its meaning must, according to the natural and obvious force of the terms and the context, be limited to *means necessary to the end, and incident to the nature of the specified powers*." 2 Annals of Cong. 1947 (1791) (statement of Rep. Madison).[9]

A faithful application of these established constitutional principles requires a determination whether the injunction represents a necessary and proper exercise of Congress's power under the Commerce Clause. The district court failed to engage in this separate and crucial analysis.

a. Substantial Effects Must Be Judicially Scrutinized

When it enjoined Appellants' activities, the district court abdicated completely its responsibility to scrutinize the government's claim that Appellants' activities substantially affect interstate commerce. Indeed, the district court

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[9] Although there came to be disagreement between Madison, Jefferson, and Randolph on the one hand, and Hamilton and Marshall on the other, about the degree of necessity that must be shown, all agreed that, for a measure to be "necessary," there must be a sufficient fit between the means chosen and the enumerated end. *See McCulloch*, 17 U.S. (4 Wheat.) at 421 (stating that means chosen must be "plainly adapted" to an enumerated end).

applied the wrong standard, summarily concluding that Appellants' activities "*can affect* interstate commerce." ER 664 (emphasis added). In *United States v. Lopez*, 514 U.S. 549 (1995), however, the Supreme Court confirmed that the claim of power under the Necessary and Proper Clause requires separate and less deferential review than that applied to an exercise of plenary power directly over interstate commerce. The Court reaffirmed this principle in *United States v. Morrison,* 529 U.S. 598 (2000). In *Lopez*, the Supreme Court held that Congress may reach wholly intrastate economic activity under the Necessary and Proper Clause *only* if that activity is shown to "substantially [a]ffect[] interstate commerce." 514 U.S. at 560.[10] In *Lopez* and *Morrison*, the Court applied the standard it had asserted in *Wickard v. Filburn*, 317 U.S. 111 (1942), where the reach of Congress was described as limited to intrastate activities "which *in a substantial way* interfere with or obstruct the exercise of the granted power." *Id.* at 124 (citation omitted; emphasis added); *see also id.* at 125 (activity may "be reached by Congress if it exerts a *substantial* economic effect on interstate commerce") (emphasis added).

The Supreme Court has taken the standard provided by *Wickard* seriously; the district court did not. The district court erred by issuing the injunction without requiring any showing by the government that the activities enjoined have this substantial effect. Here, as in *Lopez,* there has been no showing either by Congress or by the government that the activity enjoined by the district court — the wholly intrastate distribution of cannabis solely for medical use — either substantially

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[10] This case does not fall under either of the first two categories of permissible Commerce Clause regulation identified in *Lopez:* the "use of channels of interstate commerce" or the regulation and protection of "the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities." 514 U.S. at 558. Thus, only the third category is arguably at issue here: "the power to regulate . . . those activities that substantially affect interstate commerce." *Id.* at 558-59.

interferes with Congress's exercise of power over interstate commerce, or exerts a substantial effect on interstate commerce.[11] As Judge Kozinski has recently observed, "[m]edical marijuana, when grown locally for personal consumption, does not have any direct or obvious effect on interstate commerce." *Conant v. Walters*, __ F.3d __, No. 00-17222, 2002 WL 31415494, at *14 (9th Cir. Oct. 29, 2002) (Kozinski, J., concurring). As with the statute at issue in *Lopez,* neither the CSA "'nor its legislative history contain[s] express Congressional findings regarding the effects upon interstate commerce'" of the wholly intrastate sale of cannabis solely for medical purposes. 514 U.S. at 562 (quoting the government's brief in that case).

On the state of this record, the failure of Congress, or the government in its place, to provide any evidence of the substantial effects on interstate commerce of the class of activities enjoined here entitles Appellants to relief in *this Court* from the injunction. In *Lopez*, the Supreme Court found a statute unconstitutional that lacked any findings; in *Morrison*, the Court found a statute unconstitutional that was supported by extensive Congressional findings the Court found to be insufficient. In neither case was the issue of substantial effects remanded to a lower court.

It is within the province of this Court to determine that there has been an *inadequate showing of substantial effects*. However, before this Court determines that *substantial effects exist*, Appellants are entitled to a hearing in which the

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[11] This case is thus distinguishable from cases generally upholding the constitutionality of the CSA as applied to intrastate trafficking in *recreational* drugs, an activity that dwarfs in scope the use of cannabis *for medical purposes*. *See, e.g., United States v. Tisor*, 96 F.3d 370 (9th Cir. 1996). Appellants do not dispute the federal government's power to regulate or prohibit interstate commerce in recreational drugs, or their importation from foreign nations, nor the continued police power of States to prohibit the intrastate possession, manufacture, or distribution of recreational drugs.

government would be required to show that the class of activities enjoined here substantially affects the exercise of its power over interstate commerce, and in which Appellants would be able to rebut any such showing. In any such inquiry, it would be significant that the intrastate activity at issue here is the distribution of cannabis for the limited purpose of medical use by persons acting under the advice of a licensed physician, rather than for recreational use. The government would have a much harder task to show that this narrowly confined activity, carved out by the State of California, substantially affects interstate commerce than it would if the activity involved were more extensive. The more limited the intrastate activity at issue, the less impact, even taken in the aggregate, it could have on interstate commerce. Moreover, a subdivision of the State of California is regulating this limited activity, thereby further mitigating the scope of the intrastate commerce in question and any impact it may have on interstate commerce.

There is nothing in the record concerning the effect of this limited form of intrastate activity on interstate commerce other than the government's unsupported assertions. The findings in the CSA with respect to jurisdiction over intrastate activity are general and do not address the effect on interstate commerce of distribution of cannabis *to seriously ill patients who require this medicine.* Further, the rationales advanced for extending the jurisdiction of Congress to intrastate activity are so broad as to give Congress power over all commerce. *See, e.g.*, 21 U.S.C. § 801(4) ("Local distribution and possession of controlled substances contribute to swelling the interstate traffic in such substances."). Therefore, these rationales cannot be constitutionally acceptable under *Lopez* and *Morrison*.

The district court deferred completely and without analysis to the "findings" set forth in the CSA concerning the general effects of drug trafficking upon interstate commerce. ER 663-64. However, these general "findings" do not address the standard articulated in *Lopez* or *Morrison*: whether the intrastate production

and distribution of cannabis for medical purposes *substantially affects* interstate commerce. These "findings" also ignore the distinction between economic and non-economic activity specified by the court in *Lopez* and reaffirmed in *Morrison*. If these sorts of "findings" satisfy the standard of *Lopez* and *Morrison*, then Congress could simply accompany every prohibition of intrastate activity with a blanket assertion that "intrastate activity X substantially affects interstate commerce," thereby rendering these two decisions of the Supreme Court inoperative. As the Court stated in *Lopez,* "'simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so.'" 514 U.S. at 557 n.2 (quoting *Hodel v. Virginia Surface Mining & Reclamation Ass'n,* 452 U.S. 264, 311 (1981) (Rehnquist, J., concurring)). In *Morrison*, the Court reiterated that "[t]he existence of Congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation." 529 U.S. at 614.[12]

As the Supreme Court has now repeatedly affirmed, a court must pass upon such findings if our Republic is to preserve the scheme of enumerated and limited Congressional powers. As the Court stated in *Lopez* and quoted with approval in *Morrison* (529 U.S. at 614), "'[w]hether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question . . . .'"

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[12] Although this Court distinguished *Lopez* in *United States v. Tisor*, 96 F.3d 370 (9th Cir. 1996), on the ground that, in *Tisor*, there had been no Congressional findings, whereas the CSA was supported by Congressional findings (*see Tisor,* 96 F.3d at 3740), the reasoning of *Tisor* was undercut by the later case of *Morrison* where such "findings" existed. 529 U.S. at 614. The Supreme Court made it clear that the mere existence of conclusory findings was insufficient and that the evaluation of such findings was a question for the courts. *See id.*

514 U.S. at 557 n.2 (quoting *Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241, 273 (1964) (Black, J., concurring)).

If in seeking to prohibit some form of interstate commerce, Congress can prohibit the wholly intrastate commerce of particular goods on the unsupported speculation that such goods might leak out of a state and into interstate commerce,[13] or because there is no way to distinguish between goods produced within a state and those imported from other states,[14] then this would give Congress the plenary power over all commerce that the Constitution explicitly denies it. The district court improperly assumed that medical cannabis "may be transported and consumed across state lines." ER 664. However, there is no evidence that cannabis grown and distributed for the limited purpose of medical use by seriously ill Californians would be traded between States. Should this occur, the government retains its power to detect and prosecute those persons moving cannabis in interstate commerce. The bare supposition that this might occur does not give Congress a police power over persons (such as Appellants) who deliberately limit themselves to wholly intrastate activities.

Further, the wholly intrastate activities subject to the injunction in this case are not at all analogous to the intrastate activities reached by Congress in *Wickard v. Filburn,* 317 U.S. 111 (1942). In *Wickard* the Court found that Congress may regulate the intrastate production and consumption of wheat because such activities were in competition with wheat sold interstate and therefore only by reaching these intrastate activities could Congress successfully increase the market price of wheat

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[13] *See* 21 U.S.C. § 801(4) ("Local distribution and possession of controlled substances contribute to swelling the interstate traffic in such substances.").

[14] *See* 21 U.S.C. § 801(5) ("Controlled substances manufactured and distributed intrastate cannot be differentiated from controlled substances manufactured and distributed interstate.").

in interstate commerce. *See Lopez,* 514 U.S. at 560 (quoting *Wickard,* 317 U.S. at 128).

The reasoning in *Wickard* may be broad, but it is not unlimited. Under *Wickard*, Congress may only reach those intrastate economic activities that substantially impede its ability to regulate an activity that is *within* its powers, in this case its power over interstate commerce. Here there is no federal scheme of price maintenance with which the intrastate production of medical cannabis could possibly interfere. Rather, the CSA is a scheme to prohibit completely the *interstate* commerce in marijuana. If the activity enjoined here has any effect on interstate commerce at all, it would be to *reduce* the demand for cannabis supplied from outside the State and thereby diminish the interstate commerce in illegal cannabis. In this manner, it advances rather than obstructs the only proper objective of the CSA: to reduce or prohibit the interstate commerce in marijuana. Making cannabis for medical purposes available through wholly intrastate production and distribution is very likely to reduce the flow of cannabis from state to state. For this reason, if no other, this Court may refuse to find that the government has established that a substantial effect on interstate commerce exists.

b. Courts Must Scrutinize the Class of Acts to Be Aggregated Under *Wickard*

The district court also erred when it accepted without analysis the definition of the class of activities set forth in the CSA. Congress cannot have an unreviewable discretion to define as broadly as it wishes the class of intrastate activities to be aggregated under *Wickard.* Such a doctrine would lead to the absurdity that the larger the class of wholly intrastate economic activities Congress seeks to prohibit, the stronger would be its claim of implied power because the larger would be the aggregate effects of this class on interstate commerce. Yet it cannot be the case that the more penumbral power Congress claims over intrastate activities — *i.e.*,

the greater the size of the class of activities it seeks to regulate — the more justified its claim. Such a doctrine would turn on its head the constitutional first principle that Congress has only limited and enumerated powers and lacks a general police power. *See, e.g., Lopez*, 514 U.S. at 552-57, 567.

Therefore, under today's Commerce Clause jurisprudence, Congress has plenary power over *all* interstate commerce, but an implied power only over that *portion* of intrastate commerce which is shown to have a substantial effect on its power to regulate interstate commerce. A court must examine the class of activities subject to a claim of Congressional penumbral power under the Necessary and Proper Clause to determine if it is a proper classification. Otherwise Congress will gain a plenary power over wholly intrastate economic activity that the Constitution and recent decisions of the Supreme Court deny it.

In drawing the class of activities to which to apply the "substantial effects" test, Appellants' arguments concerning the Commerce Clause cannot be entirely separated from their other arguments, and the Court cannot ignore the context and origin of this case. For, as will be discussed below, it was the People of the State of California who sought to exercise the police power of the State to make medical cannabis available to enhance the safety and health of its citizens. It is the People of the State of California, not Appellants, who have identified the class of activities that must be aggregated to see if it substantially affects the power of Congress to regulate interstate commerce in marijuana. The activities involved here are just as incident to the exercise of fundamental rights as are the distribution and sale of contraceptives to their constitutionally protected use. *See Griswold v. Connecticut*, 381 U.S. 479 (1965).

Both the exercise of the police power of the States and the existence of fundamental rights required the district court to determine: (1) whether it was necessary and proper for Congress to include *this* class of activities; and

(2) whether this *class* of activities has a substantial effect on interstate commerce. In *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159 (2001), the Supreme Court once again reaffirmed the "proposition that the grant of authority to Congress under the Commerce Clause, though broad, is not unlimited." *Id.* at 173 (citations omitted). The Court then made it plain that this requires a court "to evaluate the precise object or activity that, in the aggregate, substantially affects interstate commerce." *Id.* at 173-74. The Court in *Solid Waste* avoided this inquiry only by construing the statute as not reaching the conduct in question. *See id.* Similarly, the district court either should have construed the CSA as not applying to acts beyond the power of Congress properly to reach, as did the court in *Solid Waste*, or should have found the CSA unconstitutional as applied to Appellants in this case, as the Court did in *Lopez* and *Morrison*.

3. The Court Must Determine Whether the Government Has Acted Pretextually in Seeking to Regulate Appellants' Wholly Intrastate Activities

The Commerce Clause defines the only "proper" end of the CSA: the regulation of commerce in illicit drugs *between State and State.* Congress can reach other intrastate commercial activity under the Necessary and Proper Clause only if it is "necessary" to do so to effectuate this purpose *and no other.* Congress has no general police power by which to reach the wholly intrastate activities of Appellants. Congress may not employ its implied penumbral powers under the Necessary and Proper Clause as a pretext to reach wholly intrastate activities over which it was not granted power by the Constitution. As John Marshall stated in *McCulloch v. Maryland*, "should congress under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the govern-

ment; it would become the painful duty of this tribunal . . . to say that such an act was not the law of the land." *McCulloch*, 17 U.S. at 423.[15]

This is the crucial point ignored by the district court: The wholly intrastate commerce in medical cannabis is not an object "entrusted to [the federal] government." *Id.* at 407. The government can only reach this class of activities if it establishes (and it has not) that regulating this activity is necessary for the accomplishment of an object that is within the government's power, such as the regulation of commerce in marijuana that takes place between State and State. If the government's true objective in bringing this injunction action is to suppress wholly intrastate activity, rather than to protect or police interstate commerce, then the government is acting unconstitutionally beyond its powers. That this is the government's true intention is obvious, and this Court may so find.

At minimum, the case should be remanded to determine whether the government is acting pretextually. At such a hearing, the district court must be instructed to scrutinize: (a) the government's choice of classes to regulate; and (b) the government's claim that the otherwise lawful distribution of medical

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[15] Writing anonymously as "A Friend of the Constitution," Marshall defended his decision in *McCulloch* from the charge it granted an unlimited discretion to Congress:

> In no single instance does the court admit the unlimited power of congress to adopt any means whatever, and thus to pass the limits prescribed by the Constitution. Not only is the discretion claimed for the legislature in the selection of its means, always limited in terms, *to such as are appropriate*, but the court expressly says, "should Congress under the pretext of executing its powers, pass laws for the accomplishment of objects, not entrusted to the government, it would become the painful duty of this tribunal . . . to say that such an act was not the law of the land."

John Marshall, *A Friend of the Constitution*, ALEXANDRIA GAZETTE, July 15, 1819, *reprinted in* GERALD GUNTHER (ED.), JOHN MARSHALL'S DEFENSE OF *MCCULLOCH V. MARYLAND* 186-87 (Stanford Univ. Press 1969) (emphasis added).

cannabis to individual patients by Appellants substantially affects the government's ability to prohibit commerce in marijuana between the States.

The only treatment of these issues by the district court in its Memorandum and Order of May 3, 2002 is its invocation of *United States v. Staples,* 85 F.3d 461, 463 (9th Cir. 1996), *overruled on other grounds by United States v. Foster,* 165 F.3d 689 (9th Cir. 1999); *see also Tisor,* 96 F.3d at 375. Both cases were decided before the Supreme Court in *Morrison* affirmed that a substantial effect must be established, not merely asserted, by Congress or by the government. Before *Morrison* it was common for federal courts to accept at face value the government's or Congress's bare assertions of substantial effects. This degree of judicial deference is untenable after *Morrison.*

In its May 3, 2002 Memorandum and Order, the district court attempted to distinguish *Morrison* on the ground that, while the activity sought to be reached by the statute in *Morrison* was non-economic, the activities in this case are economic in nature. Apart from the fact that only *some* of the activities enjoined here are economic (*see* § I.A.4, *supra*), the district court failed even to address, much less apply, the reasoning of *Morrison*. *Morrison*'s reasoning casts serious doubt on the method by which the summary conclusions in *Staples* and *Tisor* were reached.

The district court also failed completely to address Appellants' argument that this case concerns the constitutionality of enjoining a much narrower class of activities than was at issue in *Staples* or *Tisor*. In *Staples*, this Court held that a section of the CSA, which imposed penalties for carrying a firearm during the commission of a crime of violence or drug trafficking, was a constitutional exercise of Congressional power under the Commerce Clause because "drug trafficking is a commercial activity which substantially affects interstate commerce." 85 F.3d at 463. In *Tisor*, this Court upheld the constitutionality of the CSA on the grounds that intrastate "drug trafficking" substantially affects inter-

state commerce. 96 F.3d at 375. Unlike those cases, Appellants here are not engaged in "drug trafficking," which implies the for-profit sale of recreational drugs and attendant activities such as the use of firearms. It is undisputed that Appellants' only activities are the non-profit, state-authorized, intrastate distribution of medical cannabis to seriously ill patients who would not otherwise have safe access to medical treatment. Accordingly, *Staples* and *Tisor* did not find that the distribution of cannabis to seriously ill patients permitted by state law and subject to its regulation has a substantial effect on interstate commerce. This issue was not previously before this Court, and the district court erred therefore in not addressing it in this case. It further erred in not requiring the government to show that this class of activities substantially affects its power to regulate interstate commerce.

Fidelity to decisions of the Supreme Court requires that the Court's reasoning be taken into account when lower federal courts encounter somewhat different facts to which that reasoning applies with equal force. In the present case, the Supreme Court did not summarily reject Appellants' constitutional arguments. Rather, it refused to rule on them because these arguments had not been addressed by this Court in its previous ruling. Most remain unaddressed by the district court. In light of the principles established by the Supreme Court decision in *Lopez* and reaffirmed in *Morrison*, this Court should not allow the government to reach the wholly intrastate activity enjoined here.

4. Some of Appellants' Intrastate Activities Are Non-economic and Therefore Cannot Be Prohibited Under Either the Commerce Clause or the Necessary and Proper Clause

Even if the district court was correct in concluding that the intrastate sale of cannabis for medical purposes is an economic activity that substantially affects the illegal sale of marijuana between States, Congress would still lack power to reach

that portion of Appellants' activities that are non-economic. In light of the Supreme Court decisions in *Lopez* and *Morrison* limiting the substantial effects approach of *Wickard* to economic activity, *Staples* and *Tisor* are completely inapplicable to this issue. Appellants argued below that the district court must therefore modify the injunction to exclude such non-economic activities. The district court completely ignored this issue in its May 3, 2002 Memorandum and Order. ER 4404-15.

The injunction prohibits the acquisition of cannabis by seriously ill persons upon recommendation of their physicians, and the intrastate cultivation and distribution of cannabis for this limited purpose. Yet the private possession, use, and cultivation of cannabis for medicinal purposes are not economic activities at all. Nor is it an economic activity to cultivate or distribute cannabis without charge or gain.[16]

In *Lopez*, the Supreme Court held that Congress's regulatory power did not extend to the non-economic intrastate act of possessing a firearm within 1,000 feet of a school regardless of whether the act satisfied the aggregation principle of *Wickard*. In *Morrison*, it held that this power did not extend to the non-economic intrastate act of rape. In *Morrison*, it noted that, "thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is *economic in nature*." *Morrison,* 529 U.S. at 613 (emphasis added).

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[16] Thus, these activities are not "commerce," whether one adopts the original meaning of the term as "selling, buying, and bartering, as well as transporting for these purposes," or extends the term to include all "economic" activities. *Lopez,* 514 U.S. at 585 (Thomas, J., concurring). Under either definition, the private possession, use, and cultivation of cannabis — or distributing cannabis to another *without charge* — for medical purposes is not an economic activity.

Just as regulation of gun possession and rape lies solely within the police power of the States, so too does the regulation and prohibition of the non-economic activities now covered by the injunction. As explained in *Morrison*, "we can think of no better example of the police power, which the Founders denied the National government and reposed in the States, than the suppression of violent crime and vindication of its victims." 529 U.S. at 618. What is true for rape and gun possession is equally true for the non-economic and nonviolent possession, use, cultivation, acquisition, and distribution of cannabis for medical purposes. Like gun possession and rape, this is a matter most appropriately regulated by local authorities with intimate knowledge of local conditions and attitudes. *See GMC v. Tracy*, 519 U.S. 278, 306 (1997) ("[T]he Commerce Clause . . . was never intended to cut the States off from legislating on all subjects relating to the health, life and safety of their citizens, though the legislation might indirectly affect the commerce of the country."). Such non-economic conduct, therefore, lies squarely within the police power of the States and outside the power of Congress to regulate "commerce."

The "aggregation principle" of *Wickard* discussed in § I.A.2 *supra* does not apply to the mere non-economic possession, use, cultivation, acquisition, and distribution of cannabis for medical purposes. As was explained in *Morrison*, "in every case where we have sustained federal regulation under *Wickard*'s aggregation principle, the regulated activity was of an apparent commercial character." *Morrison,* 529 U.S. at 611 n.4. Because Appellants' acts are not "economic" or "commercial," they are outside Congress's power under both the Commerce Clause and the expansive reading of the Necessary and Proper Clause adopted in *Wickard.*[17] The government does not dispute that Appellants often provided medi-

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[17] In *Tisor*, 96 F.3d at 374, this Court, in *dicta*, interpreted *Lopez* as allowing the aggregation principle of *Wickard* to apply to "wholly intrastate activity" which "has nothing to do with 'commerce,'" a proposition later explicitly rejected by the

(Footnote continues on following page.)

cal cannabis to qualified members without charge.[18] To the extent the injunction prohibits these non-economic activities, it is unconstitutional and must be modified.

II. EVEN IF THE INJUNCTION IS "NECESSARY," IT IS NONETHELESS UNCONSTITUTIONAL IF IT IMPROPERLY INTERFERES WITH THE EXERCISE OF SOVEREIGN POWERS OR FUNDAMENTAL RIGHTS

In its May 3, 2002 Order the district court ignored completely Appellants' arguments concerning the injunction's effect on state sovereignty and federalism. Because there is no unassigned reservoir of power from which extra-Congressional powers can be taken without constitutional cost, the arguments presented in the previous section and those presented here are linked. An overextension of Congressional power either by statute or by an overbroad injunction must intrude upon the reserved powers of the States, the rights and powers retained by the people, or both.

Even when Congress exercises a delegated power, the means it employs are improper when they interfere with the exercise of sovereign state powers or the fundamental rights of individuals. As Judge Kozinski recently explained: "The Commerce Clause limits the scope of national power, while the commandeering doctrine limits how Congress may use the power it has. These checks work in tandem to ensure that the federal government legislates in areas of truly national

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(Footnote continued from previous page)
Supreme Court in *Morrison*. This *dicta* in *Tisor* is, therefore, no longer an accurate statement of the law.

[18] The Cooperative is legally organized as a California Consumer Cooperative Corporation (ER 2988-89) pursuant to the California Consumer Cooperative Corporation Law. Cal. Corp. Code §§ 12200-12704. No person receives any dividends, rebates, or distributions from the Cooperative. The Cooperative members are the only owners of the Corporation. In law, and in fact, the Cooperative *is* its members. As such, *all* of its activities could be non-economic.

concern, while the states retain independent power to regulate areas better suited to local governance." *Conant,* 2002 WL 31415494, at *14 (Kozinski, J., concurring).

Based as it is on an overbroad interpretation of the Commerce and Necessary and Proper clauses, the injunction here improperly intrudes both upon the sovereign powers reserved to the States and upon the rights retained by the people. Under the Necessary and Proper Clause, a law must not only be necessary, it also "shall be . . . proper." U.S. CONST. art. I, § 8, cl. 18. In *Printz v. United States,* 521 U.S. 898 (1997), the Supreme Court noted that one aspect of the "propriety" of a law is whether it intrudes upon the sovereignty of a State.

> When a "Law . . . for carrying into Execution" the Commerce Clause violates the principle of state sovereignty . . . it is not a "Law . . . *proper for* carrying into Execution the Commerce Clause, and is thus, in the words of The Federalist, merely [an] act of usurpation" which "deserves to be treated as such." The Federalist No. 33, at 204 (A. Hamilton).

Id. at 923-24 (citing also Lawson & Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 297-326, 330-33 (1993)).

As Lawson & Granger have shown, historically, to be "proper," "executory laws must be consistent with principles of separation of powers, principles of federalism, and individual rights." *Id.* at 297. Thus, even if the injunction is found to be "necessary" to execute the power of Congress to regulate commerce among the States, the Court must still examine whether it "improperly" (a) encroaches upon the sovereign power of the State of California, or (b) infringes upon fundamental individual rights. It does both.

III. THE INJUNCTION ENCROACHES UPON THE SOVEREIGN POWERS OF THE STATE OF CALIFORNIA

The district court made no effort in any of its rulings to consider the extent to which the injunction infringes upon the sovereign powers reserved to the State

of California by the Tenth Amendment. As the Supreme Court observed in *New York v. United States*, 505 U.S. 144, 157 (1992), "the Tenth Amendment confirms that the power of the Federal government is subject to limits that may, in a given instance, reserve power to the States." While the Constitution delegates to Congress the power over interstate commerce and other national concerns, the States are primarily responsible for the health and safety of their citizens, a power known as the police power.

As noted by St. George Tucker, learned jurist and author of the earliest treatise on the Constitution: "The congress of the United States possesses no power to regulate, or interfere with the domestic concerns, or police of any state." Tucker, 1 Appendix to *Blackstone's Commentaries* 315-16 (1803). On the other hand, the power of Congress over interstate commerce is plenary. *See Gibbons,* 22 U.S. 1 (9 Wheat) at 197. These propositions are not inconsistent. As stated in *Printz*, 521 U.S. at 924, the power over interstate commerce, while plenary, cannot be exercised in a manner that improperly "violates the principle of state sovereignty" by intruding upon the traditional sovereign powers of States. Moreover, Congress cannot properly claim an *incidental* or implied power to reach wholly *intrastate* activity under the Necessary and Proper Clause when doing so would interfere with the exercise of State sovereign powers. The serious concerns of federalism (and individual rights) must inform any analysis of claimed implied powers. *Cf. Conant*, 2002 WL 31415494, at *14 ("The commandeering problem becomes even more acute where Congress legislates at the periphery of its powers. The Constitution authorizes Congress to regulate activities that affect interstate commerce. But that authority is not boundless.") (Kozinski, J., concurring).

Given the absence of a general Congressional police power, if the States cannot exercise such a power, then no unit of government can. It is essential for the welfare of the people that the States be allowed to exercise their police powers

effectively and without interference from the federal government. Precisely because Congress has no comparable police power, it may not use its implied penumbral powers as a pretext to countermand a decision by a sovereign State and its people that a particular activity is needed to protect health and safety. That is precisely what has happened in this case.

It is undisputed that the activities enjoined by the district court were authorized by the State of California and its local government for the protection of their citizens' health. Nonetheless, the district court rejected well-established Supreme Court precedent recognizing the authority of state and local governments to enact measures reasonably necessary to protect public health when it issued the injunction. In *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), the Supreme Court rejected a constitutional challenge to a Massachusetts law requiring compulsory vaccinations. *See id.* at 48-49. The Supreme Court confirmed that States may enact wholly intrastate measures to protect public health.

> The authority of the State to enact this statute is . . . commonly called the police power — a power which the State did not surrender when becoming a member of the Union under the Constitution. Although this Court has refrained from any attempt to define the limits of that power, yet it has distinctly recognized the authority of a State to enact quarantine laws and "health laws of every description;" indeed, all laws that relate to matters completely within its territory and which do not by their necessary operation affect the people of other States. According to settled principles the police power of a State must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety.

Id. at 24-25.

Similarly, the court has upheld State regulations of professions that "closely concern" public health. *See, e.g., Watson v. Maryland*, 218 U.S. 173, 176 (1910). In *Watson*, the Supreme Court noted:

> It is too well settled to require discussion at this day that the police power of the States extends to the regulation of certain trades and

> callings, particularly those which closely concern the public health. There is perhaps no profession more properly open to such regulation than that which embraces the practitioners of medicine.

See id. at 176. *See also Williams v. Arkansas*, 217 U.S. 79 (1910) (regulation of businesses or professions, essential to the public health or safety, falls within the police power of the State so long as such regulations are reasonable and necessary).[19]

Recently this Court reaffirmed, in the context of medical cannabis, the "principles of federalism that have left states as the primary regulators of professional conduct." *Conant,* 2002 WL 31415494, at *8 (citing with approval *Whalen v. Roe,* 429 U.S. 589, 603 n.30 (1977) (recognizing states' broad police powers to regulate the administration of drugs by health professionals); and *Linder v. United States,* 268 U.S. 5, 17 (1925) ("direct control of medical practice in the states is beyond the power of the Federal government")).

True, under the Supremacy Clause, States cannot exercise their police powers to interfere with the power of Congress over *interstate* commerce. When Congress says "yes" to interstate commerce, states may not use their police power to say "no." This is what the age-old "dormant Commerce Clause" doctrine is all about. Conversely, however, Congress cannot exercise its power over interstate commerce to interfere with a state's police power by prohibiting *wholly intrastate* conduct which a state endorses in the interest of health and safety. This would be improper under the Necessary and Proper Clause.

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[19] After *Watson*, the Supreme Court upheld other regulations of professions related to the public health as a legitimate exercise of the State's police power to protect public health. *See, e.g., Barsky v. Board of Regents*, 347 U.S. 442 (1954) (affirming suspension of a physician based on New York law prohibiting the practice of medicine by those convicted of a crime); *Douglas v. Noble*, 261 U.S. 165 (1923) (affirming injunction preventing unlicensed dentists from practicing dentistry).

The State's police power over health and safety is not limited to telling citizens in which activities they may *not* engage; it includes specifying activities in which they *may* (or must) engage. Here the State of California and its voters, through the initiative process, have determined that the health and safety of the State's citizens are best served by allowing seriously ill persons access to cannabis for medical purposes. The City of Oakland has declared a public health emergency, which it renews every two weeks, finding that lack of access to medical cannabis impairs public health and safety. ER 3058-59, 3063-65.

Under the circumstances of this case, this Court should respect the choice made both by a sovereign State and by the sovereign people of that State. Citing the concurrence in the Supreme Court decision in this case, this Court recently recognized that:

> We must "show[ ] respect for the sovereign States that comprise our Federal Union. That respect imposes a duty on federal courts, whenever possible, to avoid or minimize conflict between federal and state law, particularly in situations in which the citizens of a State have chosen to serve as a laboratory in the trial of novel social and economic experiments without risk to the rest of the country." *Oakland Cannabis*, 532 U.S. at 501 (Stevens, J., concurring) (internal quotation marks omitted).

Conant, 2002 WL 31415494, at *8.

The principle of federalism at issue in these proceedings extends far beyond medical cannabis. The power claimed by the government to interfere with State police power would extend to traditional State functions such as licensing of doctors, attorneys, and other professionals. All these activities are "economic." The only constitutional doctrine preventing federal usurpation of these traditionally State-regulated activities is that such federal laws would improperly violate the principles of federalism affirmed in *Printz*.

This constitutional problem was identified by Judge Kozinski in his concurring opinion in *Conant*: "The federal government's policy deliberately undermines

the state by incapacitating the mechanism the state has chosen for separating what is legal from what is illegal under state law." 2002 WL 31415494, at *12. Invoking the proposition from *New York* and *Printz* that "[t]he Federal government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program," *Printz,* 521 U.S. at 935, Judge Kozinski concluded that: "Applied to our situation, this means that, much as the federal government may prefer that California keep medical marijuana illegal, it cannot force the state to do so." *Conant*, 2002 WL 31415494, at *12.

As in *Conant*, by the injunction in this case:

> the federal policy makes it impossible for the state to exempt the use of medical marijuana from the operation of its drug laws. In effect, the federal government is forcing the state to keep medical marijuana illegal. But preventing the state from repealing an existing law is no different from forcing it to pass a new one; in either case, the state is being forced to regulate conduct that it prefers to leave unregulated.

Id.

Appellants do not deny that when there is a conflict between Congress's enumerated power over interstate commerce and the police power of a State, it is the power of Congress that prevails. Appellants contend instead that, when the scope of the Commerce and Necessary and Proper clauses is properly interpreted, there is simply no conflict between these clauses and the police power of the States to protect the public health. A conflict arises only when Congress goes *beyond its authority under the Commerce Clause* over "commerce . . . among the several states" to reach wholly intrastate activity in a manner that improperly interferes with the exercise of a vital police power of a State. U.S. CONST. art. I, § 8, cl. 3.

The formal separation of state and federal powers is highly functional. In our system of dual sovereignty, it prevents one sovereign from obstructing the vital jobs assigned by the Constitution to the other, while still imposing on both sovereigns the obligation to respect the fundamental rights of citizens. Congress can no more be the sole judge of the extent of its own commerce powers than can a state be the sole judge of its own police powers. And neither can be the judge of whether its exercise of powers has violated fundamental rights of the citizenry.

IV. THE INJUNCTION VIOLATES THE FUNDAMENTAL RIGHTS OF APPELLANTS' PATIENT-MEMBERS

Even if this Court concludes that the injunction neither exceeds the powers of Congress nor improperly interferes with state sovereignty, this Court must still consider whether the injunction improperly infringes upon constitutionally protected liberties. *See Washington v. Glucksberg,* 521 U.S. 702, 720-21 (1997); *Gerber v. Hickman*, 264 F.3d 882, 886-88 (9th Cir. 2001). As discussed below, the injunction in this case violates the fundamental unenumerated rights of Appellants, an issue the district court addressed in a cursory fashion in its September 1998 Order and entirely failed to address in its May 3, 2002 and June 10, 2002 orders granting summary judgment and issuing the permanent injunction.

A. The Injunction Violates Fundamental Constitutional Rights Protected By The Fifth And Ninth Amendments

Although the protection of unenumerated liberties traditionally has been afforded against the federal government under the Due Process Clause of the Fifth Amendment, it is also both textually and historically warranted under the Necessary and Proper Clause (for reasons already discussed) and under the Ninth Amendment's express injunction that: "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX. As Madison explained in his speech to the House discussing the Bill of Rights, the Ninth Amendment was intended to negate

any inference that "those rights which were not singled out, were intended to be assigned into the hands of the General government, and were consequently insecure." 1 Annals of Cong. 456 (1789).

The Ninth and Tenth Amendments perform distinct functions. The Tenth Amendment reads, "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. Madison explained that, while the Tenth Amendment "exclude[s] every source of power not within the Constitution itself," the Ninth Amendment "guard[s] against a latitude of interpretation" of those enumerated powers. 2 Annals of Cong. 1951 (1791) (referring to the 11th and 12th articles proposed to the states for ratification).[20] Thus, while the Tenth Amendment limits Congress to its delegated powers,[21] the Ninth Amendment prohibits an unduly broad interpretation of these powers.

Citing the Ninth Amendment, the Supreme Court supported a broad reading of constitutional liberty in *Planned Parenthood v. Casey,* 505 U.S. 833, 848 (1992), where it stated: "Neither the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects. *See U.S.* Const., Amdt. 9." The same proposition holds true for the Due Process Clause of the Fifth Amendment, which protects fundamental rights from encroachment by federal power.

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[20] Any claim that the Ninth Amendment was purely a "federalism" provision that merely underscored the scheme of limited and enumerated federal powers is undermined by its incorporation into a number of *state* constitutions, as early as 1794 in Georgia. Today many States have Ninth Amendment-like provisions. ER 2939.

[21] *See also* U.S. CONST. art. I, sec. 1 ("All legislative Powers *herein granted* shall be vested in" Congress) (emphasis added).

Nor is *Casey* the only time in recent history that the Supreme Court appropriately cited the Ninth Amendment in support of its decision to protect an unenumerated right. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 579 n.15 (1980) ("Madison's efforts, culminating in the Ninth Amendment, served to allay the fears of those who were concerned that expressing certain guarantees could be read as excluding others."). In *Richmond*, the Court concluded that "fundamental rights, even though not expressly guaranteed, have been recognized by the court as indispensable to the enjoyment of rights explicitly defined." *Id.* at 580. +++

As the Supreme Court has long held, unenumerated liberties can be as fundamental as enumerated liberties. *See, e.g., Meyer v. Nebraska,* 262 U.S. 390 (1923) (right of parents to educate their children in the German language); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (right of parents to send their children to private Catholic school); *Troxel v. Granville*, 530 U.S. 57 (2000) (right of parents to make decisions concerning children's care). To receive constitutional protection, an unenumerated liberty must be "'deeply rooted in this Nation's history and tradition,' [*Moore v. East Cleveland,* 431 U.S. 494, 503 (1977)] . . . and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if [it] were sacrificed,' [*Palko v. Connecticut*, 302 U.S. 319, 325 (1937)]." *Glucksberg,* 521 U.S. at 720-21. In Due Process cases, the Supreme Court has emphasized that a claimed right can have roots in "our Nation's history, legal traditions, and practices." *Id.* at 710. An analysis of the history and tradition of a right "tends to rein in the subjective elements that are necessarily present in due-process judicial review." *Id.* at 722. As outlined below, this Nation's history, legal tradition, and practice demonstrate that the rights infringed by the injunction are "fundamental." Moreover, the People of eight States have expressed approval

of the liberty asserted here, thereby adding their weight to a judicial conclusion that the liberty at stake in this case is fundamental.[22]

1. The Right to the Sole Life-Saving Method of Medical Treatment Is a Fundamental Right

Declarations submitted to the district court from many of Appellants' patient-members established that access to medical cannabis provided by OCBC was the sole reason for their survival of terminal illnesses, such as cancer or AIDS. ER 2947, 2966-67, 2971, 3045-46. These patients have a liberty interest in being free from pain and in preserving their lives with the assistance of a physician. *See Glucksberg,* 521 U.S. at 737, 745 (O'Conner, J., concurring) (Stevens, J., concurring) ("Avoiding intolerable pain and the indignity of living one's final days incapacitated and in agony is certainly '[a]t the heart of [the] liberty . . . to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.'") (citation omitted). There can be no right more fundamental than the right to preserve one's life.[23] The patient-members' right to medical cannabis,

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[22] The district court speculated that Appellants may not have standing to assert the constitutional rights of patient-members. ER 4411. There is no legal basis for this conclusion. Under well-established constitutional doctrines, OCBC plainly has organizational standing to assert the constitutional rights of its patient-members. *See Sierra Club v. Morton*, 405 U.S. 727, 739 (1972), *superseded by statute on other grounds by FAIC Secur., Inc. v. United States*, 768 F.2d 352 (D.C. Cir. 1985); *see also Warth v. Seldin,* 422 U.S. 490, 511 (1975); *NAACP v. Alabama,* 357 U.S. 449, 459 (1958). As a consumer cooperative formed pursuant to California Corporations Code sections 12200-12704, in law and in fact, the Cooperative is its members. Permitting the Cooperative to assert the rights of its patient-members is particularly appropriate where, as in this case, individuals fearing criminal prosecution are reluctant to come forward. *See* 13 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3531.9, at 613-15 (2d ed. 1984).

[23] The Due Process Clause protects other important, but less vital, liberty interests as fundamental rights. *See, e.g., Moore*, 431 U.S. 494 (1977) (right to keep extended family together); *Roe v. Wade*, 410 U.S. 113 (1973) (right to abortion); *Loving v. Virginia*, 388 U.S. 1 (1967) (right to marry); *United States v.*

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which serves the dual purpose of alleviating pain and staving off death, is an unenumerated fundamental right.

A fundamental right may be either enumerated in the text of the Constitution and its amendments or unenumerated but so "deeply rooted in this Nation's tradition and history" as to warrant strict scrutiny. *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977); *see also* U.S. CONST. amend. IX ("The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."); *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938) (enumerated rights); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (unenumerated rights).

Because the right to bodily integrity and life-saving medical treatment is unenumerated, substantive due process analysis must begin with an examination of our "nation's history, legal traditions, and practices." *Glucksberg*, 521 U.S. at 710; *see also Moore*, 431 U.S. at 503 ("Appropriate limits on substantive due process come not from drawing arbitrary lines but rather from careful 'respect for the teachings of history [and] solid recognition of the basic values that underlie our society.'") (citation omitted). As outlined below, this Nation's history, legal tradition, and practice of protecting the individual's right to privacy and bodily integrity and of safeguarding the physician-patient relationship demonstrate that the right claimed by the patient-members is "fundamental" within the meaning of the Due Process Clause of the Fifth Amendment.

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Guest, 383 U.S. 745 (1966) (right to travel); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (right to purchase contraceptives); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (right to choose education); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (right to teach foreign languages); *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (right to refuse medical treatment).

a. The Right to Bodily Integrity, to Ameliorate Pain, and to Prolong Life

The uncontradicted record in this case establishes the ancient and long-accepted use of cannabis as a medicine in this country. ER 3027-30. The common law contained no proscription against medical cannabis, and when the original 13 States ratified the Bill of Rights, cannabis was in use as a medicine. ER 3027-28. Until 1941, cannabis was indicated for numerous medical conditions in the pharmacopoeia of the United States. ER 3028-29. *While the liberty to use cannabis for medical purposes has a long tradition in America, the same cannot be said for the claim of federal power to control it.* ER 3029. Indeed, the first federal restriction on its sale was the Marihuana Tax Act of 1937. ER 3029.

Federal legal precedent also protects fundamental rights to bodily integrity and to obtain medical treatment for serious pain. Recent Supreme Court jurisprudence in the so-called "right to die" cases articulates these rights. Four concurring opinions in *Washington v. Glucksberg* strongly suggest that the Due Process Clause protects an individual's right to obtain medical treatment to alleviate unnecessary pain. Justice O'Connor's opinion makes clear that suffering patients should have access to any palliative medication that would alleviate pain even where such medication might hasten death: "[A] patient who is suffering from a terminal illness and who is experiencing great pain has *no legal barriers* to obtaining medication, from qualified physicians . . . ." *Glucksberg*, 521 U.S. at 736-37 (O'Connor, J., concurring) (emphasis added).

Similarly, Justice Breyer's concurrence suggests that a "right to die with dignity" includes a right to "the avoidance of unnecessary and severe physical suffering." *Id.* at 790 (Breyer, J., concurring). Referring to the protected "substantive sphere of liberty," Justice Stevens wrote:

> Whatever the outer limits of the concept may be, it definitely includes protection for matters "central to personal dignity and

> autonomy." It includes "the individual's right to make certain unusually important decisions that will affect his own, or his family's, destiny. The Court has referred to such decisions as implicating 'basic values,' as being 'fundamental,' and as being dignified by history and tradition."

Id. at 744 (Stevens, J., concurring) (citation omitted).

At the heart of this traditionally recognized liberty, Justice Stevens noted, was that of "[a]voiding intolerable pain and the indignity of living one's final days incapacitated and in agony." *Id.* at 745. Justice Souter likewise recognized that this "liberty interest in bodily integrity"[24] includes "a right to determine what shall be done with his own body in relation to his medical needs." *Id.* at 777 (Souter, J., concurring).

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[24] The right to be free of government intrusion with respect to one's body has roots in natural rights principles and the philosophy of individual autonomy. *See* JOHN STUART MILL, ON LIBERTY 15-17 (Prometheus Books 1986) (1859) (concluding that "[o]ver himself, over his own body and mind, the individual is sovereign"). American legal precedent in the past century has consistently upheld legal protection for this individual right. *See, e.g., Cruzan v. Director, Mo. Dept. of Health,* 497 U.S. 261, 281 (1990) (finding that the Due Process Clause protects an interest in life as well as an interest in refusing life-sustaining medical treatment); *Winston v. Lee*, 470 U.S. 753, 766 (1985) (finding involuntary surgery to remove bullets from defendant's shoulder unreasonable invasion of his body); *Ingraham v. Wright*, 430 U.S. 651, 673-74 (1977) ("The liberty preserved from deprivation without due process include[s] . . . a right to be free from and to obtain judicial relief, for unjustified intrusions on personal security. . . . [This] encompass[es] freedom from bodily restraint and punishment"); *Estelle v. Gamble*, 429 U.S. 97, 103-04 (1976) (stating in the context of prisoners' rights that "denial of medical care may result in pain and suffering which no one suggests would serve any penological purpose . . . . The infliction of such unnecessary suffering is inconsistent with contemporary standards of decency as manifested in modern legislation.") (citation omitted); *Rochin v. California,* 342 U.S. 165, 172 (1952) (finding an unconstitutional violation of bodily integrity when police took defendant to hospital and administered an emetic to recover pill swallowed upon arrest); *Schloendorff v. Society of N.Y. Hospital*, 105 N.E. 92, 93 (N.Y. 1914), *overruled in part by Bing v. Thunig*, 143 N.E.2d 3 (1957) (stating in a case involving the patient's claim that her doctor had removed a tumor without her consent, that "[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body.").

In *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261 (1990), the Supreme Court affirmed that the Due Process Clause confers a liberty interest in life upon all citizens.[25] *See id.* at 281 ("It cannot be disputed that the Due Process Clause protects an interest in life . . . ."). As Justice Brennan noted: "The right . . . to determine what shall be done with one's own body, is deeply rooted in this Nation's traditions, as the majority acknowledges." *Id.* at 305 (Brennan, J., dissenting). "Our duty, and the concomitant freedom, to come to terms with the conditions of our own mortality are undoubtedly 'so rooted in the traditions and conscience of our people as to be ranked as fundamental,' and indeed are essential incidents of the unalienable rights to life and liberty endowed us by our Creator." *Id.* at 343 (Stevens, J., dissenting) (citations omitted).

The established precedent and the arguments of the government itself in other cases are in accord. A majority of the Supreme Court in *Planned Casey*, 505 U.S. at 852 (1992); *Hudson v. McMillian*, 503 U.S. 1, 9-10 (1992); and *Ingraham*, 430 U.S. at 673-74, assumed the existence of a fundamental right of a seriously ill patient to be free from perdurable pain and suffering. In the United States' *amicus* brief for the petitioners in *Glucksberg*, the Solicitor General cited these decisions to assert that the infliction of severe pain or suffering on an individual implicates a fundamental liberty interest:

> A competent, terminally ill adult has a constitutionally cognizable liberty interest in avoiding the kind of suffering experienced by the plaintiffs in this case. That liberty interest encompasses an interest in avoiding not only severe physical pain, but also the despair and distress that comes from physical deterioration and the inability to

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[25] *Cruzan* is distinguishable from *Glucksberg* insofar as it involves the right to refuse life-sustaining medical care as opposed to the affirmative right to choose an assisted suicide. Despite this obvious difference, both involve the underlying right to bodily integrity and to make life and death decisions about medical treatment.

> control basic bodily or mental functions in the terminal stage of an illness.

Brief for the United States as *Amicus Curiae* Supporting Petitioners, *Washington v. Glucksberg*, 521 U.S. 702 (1997), *available in* 1996 WL 663185, at *8, 12-13 (Nov. 12, 1996).[26]

Arguably more valuable to an analysis of the recognition of fundamental rights in American legal traditions is the voice of the People themselves, versus that of federal judges. *See Troxel,* 530 U.S. at 91 ("[T]he Constitution's refusal to 'deny or disparage' other rights is far removed from affirming any one of them, and even farther removed from authorizing judges to identify what they might be, and to enforce the judges' list against laws duly enacted by the people.") (Scalia, J., dissenting). The People of the State of California have spoken through Proposition 215 to identify a fundamental right. The People of seven other states (six of which are in this Circuit) have similarly spoken: the People of Alaska (Measure 8), Arizona (Proposition 200), Colorado (Amendment 19), Maine (Question 2), Nevada (Question 9), Oregon (Measure 67), and Washington (Initiative 692). Such popular action indicates that a particular liberty is fundamental just as surely as a judicial inquiry into its historical roots.[27]

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[26] In its *amicus* brief, the United States also argued that a State cannot prevent a person in extreme pain from obtaining medication demonstrated to be safe and effective in relieving that pain (*see id.* 1996 WL 663185, at *13) and listed loss of appetite and nausea as conditions of a terminally ill person that would trigger this liberty interest. *See id.* at *15-16. Solicitor General Dellinger reiterated the existence of this fundamental liberty interest in oral argument. Transcript of Oral Argument, *Washington v. Glucksberg*, 521 U.S. 702, *available in* 1997 WL 13671, at *18, 20-21 (Jan. 8, 1997).

[27] In strongly affirming that the People may exercise their reserved powers to declare a liberty interest to be fundamental, Appellants do not suggest that the court has no power to protect the rights of individuals and minorities from popular referenda and initiatives. On the contrary, this slippery slope has already been avoided by the limiting principle supplied in *Romer v. Evans,* 517 U.S. 620 (1996),

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Finally, in practice, alleviation from pain has been embedded in the professional and ethical standards of physicians and other caregivers. Allowing a patient to experience any unnecessary pain and suffering is considered substandard medical practice, regardless of the nature of the patient's condition or the goals of medical intervention.[28] Likewise, physicians have a moral and ethical duty to provide relief from pain and suffering.[29] This standard has in fact been recognized since the inception of medical ethics in western culture.[30]

b. The Sanctity of the Physician-Patient Relationship

The right to consult with one's doctor about one's medical condition also is deeply rooted as a fundamental right in our history, legal traditions, and practices.

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which is that the People of a State can no more violate the United States Constitution than can their legislature. But where the People, or their representatives in State legislatures, act to protect a particular liberty, this provides invaluable guidance to judges who must distinguish fundamental rights from mere liberty interests.

[28] *See, e.g.,* Ben A. Rich, *A Prescription for the Pain: The Emerging Standard of Care for Pain Management*, 26 WM. MITCHELL L. REV. 1, 4 (2000).

[29] *See, e.g.*, Post et al., *Pain: Ethics, Culture, and Informed Consent to Relief*, 24 J. LAW, MED. & ETHICS 348 (1996) ("[O]ne caregiver mandate remains as constant and compelling as it was for the earliest shaman — the relief of pain. Even when cure is impossible, the physician's duty of care includes palliation."); Wanzer, et al., *The Physician's Responsibility Toward Hopelessly Ill Patients: A Second Look*, 320 NEW ENGLAND J. MED. 844, 847 (1989) (concluding that "[t]o allow a patient to experience unbearable pain or suffering is unethical medical practice").

[30] *See, e.g.,* AMUNDSEN, MEDICINE, SOCIETY, AND FAITH IN THE ANCIENT AND MEDIEVAL WORLDS 33 (Johns Hopkins Univ. Press 1996) ("The treatise entitled *The Art* in the Hippocratic Corpus defines medicine as having three roles: doing away with the sufferings of the sick, lessening the violence of their diseases, and refusing to treat those who are overmastered by their diseases, realizing that in such cases medicine is powerless"); Cassell, *The Nature of Suffering and the Goals of Medicine,* 306 NEW ENGLAND J. MED. 639 (1982) ("The obligation of physicians to relieve human suffering stretches back into antiquity.").

The right asserted by the patient-members — to prevent governmental interference with their ability to act on their doctors' treatment recommendations — is based in significant part on imperatives established by the physician-patient relationship. For this reason as well, the district court should have afforded the patient-members' rights constitutional status.

This Court's recent decision in *Conant*, 2002 WL 31415494 (9th Cir. 2002) (Schroeder, C.J.), affirms the sanctity of the physician-patient relationship in the context of medical cannabis recommendations made pursuant to California law. In *Conant*, this Court affirmed the district court's grant of a permanent injunction enjoining the federal government from investigating and ultimately revoking the DEA registration of any physician known to recommend cannabis to a seriously-ill patient. *Id.* at *1-2. Although the case was decided on First Amendment grounds, this Court explicitly recognized the importance of communication between physician and patient unimpeded by government interference:

> An integral component of the practice of medicine is the communication between a doctor and a patient. Physicians must be able to speak frankly and openly to patients. That need has been recognized by the courts through the application of the common law doctor-patient privilege. *See* Fed. R. Evid. 501.
>
> The doctor-patient privilege reflects "the imperative need for confidence and trust" inherent in the doctor-patient relationship and recognizes that "a physician must know all that a patient can articulate in order to identify and to treat disease; barriers to full disclosure would impair diagnosis and treatment." *Trammel v. United States*, 445 U.S. 40, 51, 63 L. Ed. 2d 186, 100 S. Ct. 906 (1980).

Id. at *15-16; *see also id.* at *19-20. In a concurring opinion, Judge Kozinski emphasized the particularly critical role of the physician in the context of medical cannabis recommendations under California law:

> The state law in question does not legalize use of marijuana by anyone who believes he has a medical need for it. Rather, state law is closely calibrated to exempt from regulation only patients

> who have consulted a physician. And the physician may only recommend marijuana when he has made an individualized and bona fide determination that the patient is within the small group that may benefit from its use. If medical doctors are unable or unwilling to make this determination because they fear losing their DEA registration, there is no one who can take their place. . . . If doctors are taken out of the picture — as the federal policy clearly aims to do — the state's effort to withdraw its criminal sanctions from marijuana use by the small group of patients who could benefit from such use is bound to be frustrated.

Id. at *43-44. Judge Kozinski also emphasized the value of the physician's medical experience and advice to patients regarding the use of medical cannabis:

> A far more likely consequence is that, in the absence of sound medical advice, many patients desperate for relief from debilitating pain or nausea would self-medicate, and wind up administering the wrong dose or frequency, or use the drug where a physician would advise against it. Whatever else the parties may disagree about, they agree that marijuana is a powerful and complex drug, the kind of drug patients should *not* use without careful professional supervision. The unintended consequence of the federal government's policy — a policy no doubt adopted for laudable reasons — will be to dry up the only reliable source of advice and supervision critically ill patients have, and drive them to use this powerful and dangerous drug on their own.

Id. at *38. These principles are equally applicable here.

The Supreme Court has also acknowledged the inviolability of the physician-patient relationship in numerous substantive due process cases. *See Glucksberg*, 521 U.S. at 779 ("[T]he good physician is not just a mechanic of the human body whose services have no bearing on a person's moral choices, but one who does more than treat symptoms, one who ministers to the patient."); *Roe* , 410 U.S. at 153, 156 (stressing that a violation of privacy interests, although personal to the woman, detrimentally affected the physician-patient relationship);[31] *Griswold*,

[31] The abortion cases also note the importance of medical consultation to the exercise of fundamental rights. *See Casey,* 505 U.S. at 879, 883-84; *Roe*, 410 U.S. at 163-64; *see also Stenberg v. Carhart*, 530 U.S. 914, 947 (2000) (O'Connor, J.,

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381 U.S. at 482 (finding that the criminalization of contraception violated a right guaranteed by the Due Process Clause, the court held that "[t]his law operates directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation").

State legislation granting a statutory physician-patient privilege further demonstrates the importance of the physician-patient relationship. Currently, 41 states recognize some form of a physician-patient testimonial privilege. ER 2936-37.[32] Many of the statutory privileges are a very old aspect of our nation's history and legal traditions. Though physician-patient communication is "subject to reasonable licensing and regulation by the State" (*Casey*, 505 U.S. at 884), when such regulation defeats the purpose of the physician-patient relationship by preventing the physician from fulfilling his or her duties, such regulation is impermissible. *See, e.g., Conant*, 2002 WL 31415494 (government's statutory authority to regulate drugs does not allow government to quash protected speech between physician and patient).

In this case, the interests arising within the physician-patient relationships are of the highest order. Unless the Due Process Clause guarantees the unfettered communication *and* the freedom to act on one's physician's advice concerning the treatment of serious illness, the related fundamental rights of bodily integrity, freedom from pain, and prolonging life will be rendered nugatory.

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concurring) (stating, "As we held in *Casey*, . . . any such regulation or proscription [of abortion] must contain an exception for instances 'where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.'") (citation omitted).

[32] The Federal Rules of Evidence defer to the state rules governing privilege. *See* FED. R. EVID. 501.

2. The Patient-Members' Fundamental Rights Are Different from the Rights Asserted in *Carnohan* and *Rutherford*

The district court relied in part on *Carnohan v. United States,* 616 F.2d 1120, 1121-22 (9th Cir. 1980), and *Rutherford v. United States*, 616 F.2d 455, 457 (10th Cir. 1980), when it rejected Appellants' substantive due process claim. ER 2020-23, 4411. The district court held simply that there is "no constitutional right to obtain medication free from the lawful exercise of the government's police powers." ER 2021. *Carnohan* and *Rutherford* are plainly distinguishable.

In *Carnohan*, the plaintiff brought a declaratory action "to secure the right to obtain and use laetrile [commercially] in a nutritional program for the prevention of cancer." 616 F.2d at 1121. "An individual who wishes to introduce into interstate commerce any 'new drug' must first seek approval from the Secretary of Health and Welfare." *Id.* at 1122. The relief sought (a declaration that laetrile was not a "new drug" within the meaning of the Federal Food, Drug and Cosmetic Act) fell squarely within the rule-making authority of the Food and Drug Administration (the "FDA"). *Id.* at 1121. Specifically, the claim in *Carnohan* was that the "state and federal regulatory schemes which require [filing a new drug application] are so burdensome when applied to private individuals as to infringe upon constitutional rights." *Id.* at 1122.

This Court rejected this claim, finding that the plaintiff was required to exhaust his administrative remedies to seek reclassification of the drug laetrile by filing a new drug application with the FDA. *Id.* This Court, however, expressly declined to consider whether the plaintiff had "a constitutional right to treat himself with home remedies of his own confection." *Id.*

Unlike *Carnohan,* the patient-members here do not seek reclassification of any drug and do not seek to compel the government affirmatively to give them access to any medication. The patient-members simply assert the fundamental

right to be free of governmental interference with their obtaining and using (from their own Cooperative, upon a physician's recommendation, and in accordance with California law), the medication that is effective in easing their pain and prolonging their lives. These key facts distinguish *Carnohan*.

Rutherford, another laetrile case relied upon by the district court, explicitly affirmed that, "[*t*]*he decision by the patient whether to have a treatment or not is a protected right*, but his selection of a particular treatment, or at least a medication, is within the area of governmental interest in protecting public health." 616 F. 2d at 457 (emphasis added). There is no indication that the plaintiff in *Rutherford* attempted to establish that the drug at issue represented the only effective treatment for him. Instead, he simply sought to have a particular type of treatment option declared to be a fundamental right.

This is a crucial distinction. Here, uncontroverted evidence from patient-members and their physicians establishes that cannabis is the only effective treatment for the patient-members. ER 2947, 2966-67, 2971, 3045-46. Therefore, to permit the government to interfere with the patient-members' use of cannabis is to deny them the right explicitly recognized by *Rutherford* as "protected": the right to decide whether or not to have medical treatment. Because cannabis is the *only* effective treatment for the patient-members, to deny them the right to use cannabis is to deny them any medical treatment at all. Cannabis is not simply the "medication of choice," it is the only medication for the patient-members.

Finally, as discussed in § III *supra*, this case, unlike the laetrile cases, presents a federal threat to the sovereign powers of the States. Unlike *Carnohan* and *Rutherford*, it is not merely an individual or small group who have asserted the value of cannabis to alleviate their suffering or prolong their lives. Here, the People of the State of California and their elected governments at the state and local levels have made this judgment in exercising their reserved police power.

Recently in *Oregon v. Ashcroft*, 192 F. Supp. 2d 1077 (D. Or. 2002), the district court explicitly rejected the CSA as a federal edict that decides which medications are acceptable, and affirmed state sovereignty in the realm of regulation of the practice of medicine. "The determination of what constitutes a legitimate medical practice or purpose traditionally has been left to the individual states. State statutes, state medical boards, and state regulations control the practice of medicine. The CSA was never intended . . . to establish a national medical practice or act as a national medical board." *Id.* at 1092. To the States' judgment, this Court should likewise defer.

B. The Government Has Failed to Offer Any Legitimate, Much Less Compelling, Justification for Its Infringement upon Patient-Members' Fundamental Rights

Finding a liberty interest to be "fundamental" does not end the inquiry. It merely shifts the presumption to one favoring the individual which the government may then rebut with an adequate showing. *See Carolene Products,* 304 U.S. at 152 n.4. To meet this showing, the infringing legislation must survive "strict scrutiny" — it must be "narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 302 (1993). The CSA is a "law that creates a 'substantial obstacle,' for the exercise of a fundamental liberty interest," which consequently "requires a commensurably substantial justification in order to place the legislation within the realm of the reasonable." *Glucksberg*, 521 U.S. at 767 (quoting *Casey*, 505 U.S. at 877).

The government provided substantially less than a compelling interest below, as it provided no justification at all. ER 3171-218, 4123-70. Without offering a shred of evidence to support the CSA's blanket ban on cannabis use, the government argued simply that the district court should defer to Congress. ER 4155. Where legislation infringes upon fundamental rights, however, courts have a duty to look beyond legislative findings to determine independently whether

the infringement is justified under the Constitution. "A legislature appropriately inquires into and may declare the reasons impelling legislative action but the judicial function commands analysis of whether . . . the legislation is consonant with the Constitution." *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 844 (1978). Furthermore, "courts are obligated to 'assure that, in formulating its judgments, Congress has drawn reasonable inferences, based on substantial evidence.'" *California Prolife Council PAC v. Scully*, 989 F. Supp. 1282, 1299 (E.D. Cal. 1998), *aff'd*, 164 F.3d 1189 (9th Cir. 1999) (quotations and citations omitted); *see also Casey*, 505 U.S. at 887-98 (rejecting legislative determination that requirement promoted the family relationship).[33] The government's failure to offer any evidence of a compelling state interest (or even to articulate one) should have precluded the district court's entry of summary judgment and of the permanent injunction.[34]

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[33] The district court failed to engage in the analysis required by the Constitution. Instead, concluding that no fundamental right was at issue, the district court mischaracterized Appellants' constitutional arguments as a challenge to the placement of marijuana on Schedule I, and improperly applied a "rational basis" test. ER 4411-12. Appellants do not seek to reschedule marijuana. Regardless of how marijuana is classified, the government may not, without justification, prohibit its acquisition and medical use by seriously ill patients where that medical use is authorized by state and local governments and where that prohibition infringes upon the constitutional rights of these patients.

[34] Should this Court find no fundamental right, the application of the CSA to prohibit the medical use of cannabis would also fail intermediate scrutiny, an "undue burden" standard, or the "rational basis" test for the government's failure to articulate any discernable governmental interest. ER 3261-3745.

V. THE DISTRICT COURT ERRED IN GRANTING THE GOVERNMENT'S MOTION FOR SUMMARY JUDGMENT

A. The CSA Is Unconstitutional As Applied To This Case, And Therefore Summary Judgment Was Improper

As a necessary predicate to entering the permanent injunction, the district court first granted the government's motion for summary judgment. In so doing, the district court failed to address Appellants' argument that the injunction was an unconstitutional, improper exercise of the government's power. Similarly, the district court summarily dismissed Appellants' contention that the government was not entitled to summary judgment because the injunction violated patient-members' fundamental rights. Had the district court properly considered these arguments, it could not have granted the government's motion for summary judgment. For the reasons discussed in §§ I-IV *supra,* the government was not entitled to summary judgment on its claim that Appellants' activities violated the CSA.

B. The District Court Improperly Rejected Appellants' Defenses

In granting summary judgment, the district court rejected every legal defense proffered by Appellants. Because Appellants clearly established both a legal and a factual basis for each defense, summary judgment was improper. *See, e.g., Padfield v. AIG Life Ins. Co.*, 290 F.3d 1121, 1124-30 (9th Cir. 2002) (reversing the district court's grant of summary judgment on pure matters of law under ERISA); *see also Anderson v. Liberty Lobby,* 477 U.S. 242, 250 (1986) (summary judgment inappropriate "if reasonable minds could differ as to the import of the evidence").

1. Appellants Established an Immunity Defense Under 21 U.S.C. § 885(d)

In granting the government's motion for summary judgment, the district court ruled that as a matter of law, Appellants were not entitled to immunity under 21 U.S.C. § 885(d). ER 4410-11. The district court adopted the reasoning set forth in its September 3, 1998 Order Denying Motion to Dismiss. ER 4411. As demonstrated below, the district court's analysis was plainly flawed.

The CSA provides for broad immunity for federal officials, and, on different terms, state and local government officials, in Section 885(d):

> Except as provided in sections 2234 and 2235 of Title 18, no civil or criminal liability shall be imposed *by virtue of this subchapter* upon any duly authorized Federal officer lawfully engaged in the enforcement *of this subchapter,* or upon any duly authorized officer of any State, territory, political subdivision thereof, the District of Columbia, or any possession of the United States, who shall be lawfully engaged in the enforcement *of any law or municipal ordinance relating to controlled substances.*

21 U.S.C. § 885(d) (emphasis supplied).

For two reasons, the district court rejected Appellants' claim of immunity under Oakland Ordinance No. 12076, which confers immunity on state and local officers under section 885(d). First, the district court declared that the law "relating to controlled substances" that the officer is enforcing must itself be lawful under federal law, including the CSA. ER 1173. Second, the district court held that neither an injunction nor a finding of contempt imposes "liability," and therefore the immunity from "civil or criminal liability" affords no protection against injunctive relief. ER 1174. Both of these conclusions ignore the plain language of the statute, and neither withstands analysis.

First, the grant of immunity conferred upon state and local officers under Section 885(d) is much broader and more absolute than the immunity conferred upon federal officers, a difference completely overlooked in the district court's

strained interpretation. The activity of federal officers must be directed to carrying out the objectives of the CSA itself. For state and local officers, however, immunity extends to activity in the enforcement of *any* law or municipal ordinance *relating to* controlled substances. By requiring that the local ordinance itself be "lawful" under the CSA, the district court obliterated the grant of immunity to state and local officers and extended to them the same limitation imposed upon federal officers, that their activity further "the enforcement of this subchapter."

If lawful engagement in the enforcement of a municipal ordinance means the officer's conduct cannot violate the federal CSA, then the grant of immunity is completely meaningless. The statute would say, "as long as you don't violate this subchapter, you have immunity from civil or criminal liability under this subchapter." The district court conceded the correctness of this observation, then proceeded to impose the same tautology by construing "relating to controlled substances" to mean "relating to controlled substances in conformity with this subchapter." The concern that led the district court to this strained construction was that a "loophole" would then allow municipalities to permit distribution of controlled substances on demand to anyone. ER 997. But a municipality that authorized the distribution of cannabis without the approval of a state law, such as California's Compassionate Use Act, would not be "lawfully engaged" in the enforcement of its ordinance. Neither the Compassionate Use Act nor the Oakland Ordinance is in direct conflict with federal law, because both can be implemented under the umbrella of the Congressional grant of immunity. *See Louisiana Public Service Comm'n v. F.C.C.,* 476 U.S. 355, 370 (1986) ([I]t is a "familiar rule of construction that, where possible, provisions of a statute should be read so as not to create a conflict."); *United States v. Manasche,* 348 U.S. 528, 538-39 (1955) ("[A] court is obligated to give effect, if possible, to every clause and word of a statute,

rather than to emasculate an entire section . . . .") (internal citation and quotations omitted).

The CSA itself demands respect for state efforts to rationalize drug policy, declaring that any State law otherwise within the authority of the State, *including criminal penalties,* must be applied unless there is a positive conflict between the federal and State law "so that the two cannot consistently stand together." 21 U.S.C. § 903. While the broad immunity granted in Section 885(d) is a result the government dislikes, and did not anticipate, it is not an absurd result. It is within the plain, unambiguous language enacted by Congress. Rejecting the argument that Congress could not have intended to include prisons under the Americans With Disabilities Act, Justice Scalia spoke for a unanimous Court in declaring:

> As we have said before, the fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.

Pennsylvania Dept. of Corrections v. Yeskey, 524 U.S. 206, 212 (1998) (internal quotation and citation omitted).

The second reason advanced by the district court also reads into the statute limitations that are nowhere to be found in the language used by Congress. While the *qualified* immunity of local government officials under *common law* has been construed in civil rights actions to permit injunctive or declaratory relief, *Roe v. City and County of San Francisco,* 109 F.3d 578, 586 (9th Cir. 1997); *Fry v. Melaragno,* 939 F.2d 832, 839 (9th Cir. 1991), the *absolute* immunity conferred upon state legislators and federal judges has been construed to preclude suits for injunctive or declaratory relief as well as suits for damages. *See Supreme Court of Virginia v. Consumers Union,* 446 U.S. 719, 732-34 (1980); *Moore v. Brewster,* 96 F.3d 1240 (9th Cir. 1996); *Mullis v. United States Bankruptcy Court,* 828 F.2d 1385 (9th Cir. 1987).

Rather than looking to case law defining common law immunity, the district court should have looked to the language of Section 885(d). The language used by Congress confers immunity from all civil or criminal liability "imposed by virtue of this subchapter." "This subchapter" is the entire CSA, which includes the statutory grant of jurisdiction to seek injunctive relief upon which this lawsuit was based. 21 U.S.C. § 882. Absent Section 882, the government would have no jurisdictional authority to enjoin violations of the CSA. To construe the language as only immunizing officers from suits for damages or criminal prosecutions is to engage in legislative redrafting and to ignore the plain meaning of the words Congress chose. Under the distorted construction adopted by the court below, federal drug agents could be enjoined from setting up "sting operations," even though such operations are immune from civil or criminal liability by virtue of Section 885.

The ordinary meaning of liability is correlative to the duty imposed by the law. In the succinct words of Judge Learned Hand:

> The term "liability" in colloquial speech has indeed no certain boundaries; but in law, unless the context otherwise demands, it means a duty to another enforceable by sanctions; and to "exempt" one from "liability" means to relieve him of the duty, in whole or in part, which in the case at bar would mean the payment of damages.

Krenger v. Pennsylvania R.R. Co., 174 F.2d 556, 560 (2d Cir. 1949) (Hand, J., concurring). Thus, a statutory declaration that "no civil or criminal liability shall be imposed by virtue of this subchapter" grants absolute immunity from *any duty* imposed by the subchapter, including liability for contempt of court for allegedly violating an injunction.

Where Congress has intended a grant of civil immunity to be limited to payment of damages, it has explicitly said so. *See* Administrative Procedure Act, 5 U.S.C. § 702, applied in *Presbyterian Church v. United States,* 870 F.2d 518, 524

(9th Cir. 1989); Health Care Quality Improvement Act of 1986, 42 U.S.C. § 11111(a)(1), applied in *Imperial v. Suburban Hosp. Ass'n,* 37 F.3d 1026, 1028 (4th Cir. 1994).

Whether contempt of court for violating an injunction is characterized as "civil" or "criminal," the fact remains it can be punished by fine or imprisonment or both. *See* 18 U.S.C. § 402. To declare that such liability is not "civil or criminal liability" defies common sense. The district court concluded that liability for injunctive relief necessarily includes liability for contempt, since, "[i]f that were not the law, the fact that a prosecutor is not entitled to immunity from equitable actions under 42 U.S.C. § 1983 would be meaningless since a court could never enforce its injunctions." ER 1175. The opposite, of course, is equally true. Immunity from contempt necessarily includes immunity from a suit for injunctive relief. Appellants' immunity from contempt flows from a statutory grant of immunity from all civil or criminal liability. The liability of prosecutors to suits for injunctive relief, and hence their liability for contempt, flows from the judicial construction of their common law qualified immunity in actions pursuant to 42 U.S.C. § 1983. Giving Section 885(d) its plain meaning does not imperil or threaten in any way the judicial construction of prosecutorial immunity in suits under the Civil Rights Act.

The absolute immunity conferred upon local officers by 21 U.S.C. § 885(d) must be applied with the breadth that Congress intended. As the U.S. Supreme Court concluded in *United States v. James,* 478 U.S. 597, 612 (1986):

> [O]ur role is to effectuate Congress' intent, and Congress rarely speaks more plainly than it has in the provision we apply here. If that provision is to be changed, it should be by Congress and not by this Court.

2. The District Court Improperly Rejected Appellants' "Joint User" Defense

Appellants contended below that summary judgment was improper because they had established a "joint user" defense under *United States v. Swiderski,* 548 F.2d 445 (2d Cir. 1977). In *Swiderski,* a husband and wife were jointly charged with possessing cocaine with intent to distribute. The "intent to distribute" relied upon by the prosecution was the intent to share the jointly possessed drug with each other. The court ruled that "a statutory 'transfer' could not occur between two individuals in joint possession of a controlled substance simultaneously acquired for their own use." *United States v. Wright,* 593 F.2d 105, 107 (9th Cir. 1979) (discussing *Swiderski*).

Appellants simultaneously acquire cannabis through a cooperative enterprise, for the purpose of sharing the medicine among the members of the cooperative who have the requisite physician's approval. Thus, their possession is *not* for the purpose of distribution, nor are they engaged in any distribution when they share the jointly possessed cannabis among themselves. The district court rejected this defense in granting the preliminary injunction, concluding that, "[a]pplying *Swiderski* to a medical marijuana cooperative would extend *Swiderski* to a situation in which the controlled substance is not literally purchased simultaneously for immediate consumption." ER 669. The defense was renewed in opposition to the government's Motion for Summary Judgment, and again rejected, the court adding that "[t]he sale of marijuana to the undercover agents does not, under any reasonable interpretation of the law, fall within the *Swiderski* exception to distribution." ER 4411.

The permanent injunction, of course, precludes all possession for purpose of distribution by members of the Cooperative. Regardless of whether the alleged sales to undercover agents fell within the *Swiderski* exception or not, the Appel-

lants could defend against an injunction of their future access to medical cannabis on the grounds that the sharing of medical cannabis among themselves would not constitute "distribution." The injunction does not purport to preclude possession of medical cannabis by patients for their own personal use.

Judicial resistance to expansion of the *Swiderski* exception has been based upon concerns about its possible use as a "cover" for distribution of illicit drugs. Those concerns are not present in the context of a cooperative organized to give seriously ill patients access to medicinal cannabis, however. As in *Swiderski,* the evidence established that no one other than the patient members would have access to the medical cannabis. The members were not "drawn into" drug use by the Appellants; rather, they sought the cannabis to alleviate their serious medical conditions, after they received a doctor's approval to do so. ER 935, 942, 2971, 2974, 3049. These individuals were not using cannabis for recreational purposes. *Id.,* and ER 935, 942, 2971, 2982, 2974, 3891, 3049. When medical cannabis is shared among the patient-members of OCBC, they agree to a Statement of Conditions which specifies they are joint participants "in a cooperative effort to obtain and share medical cannabis," and they agree their medication will not be shared with any other person. ER 3893-94. The Cooperative is legally organized as a California Consumer Cooperative Corporation under California law. CAL. CORP. CODE §§ 12200-12704. ER 3899. No person receives any dividends, rebates, or distributions from the Cooperative. The Cooperative's members are the only owners of the corporation. In law, and in actuality, the Cooperative is a conglomeration of its members.

Application of the *Swiderski* exception for joint users in this context is neither illogical nor extraordinary, but promotes the objectives of the CSA by eliminating numerous clandestine transactions in favor of one monitored transaction. It was error to deprive Appellants of the opportunity to present this defense.

C. The District Court Abused Its Discretion When It Overruled Appellants' Evidentiary Objections

The district court abused its discretion by overruling Appellants' evidentiary objections to the government's only evidence in support of its summary judgment motion: the declarations of undercover DEA agents. ER 3171-218, 4123-270, 4409-10. The agents' declarations detail the undercover "sting" operation whereby the agents assumed false identities, forged doctor's recommendations, and set up a telephone line for a "phony" physician,[35] to gain access to OCBC to purchase cannabis for false medical reasons. ER 4174-99. The agents' declarations are rife with inadmissible hearsay, opinion testimony, unauthenticated exhibits, and speculation in violation of the Federal Rules of Evidence. ER 3241-60; *see* FED. R. EVID. 401, 402, 403, 602, 701, 702, 801, 802, and 901. "Only admissible evidence may be considered by the trial court in ruling on a motion for summary judgment." *Beyene v. Coleman Sec. Servs., Inc.*, 854 F.2d 1179, 1181 (9th Cir. 1988). Accordingly, the district court abused its discretion in granting summary judgment, as the government's inadmissible evidence did not satisfy its burden of demonstrating that there was "no genuine issue as to any material fact" for trial. FED. R. CIV. P. 56(c); *see also Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970).

D. The District Court Abused Its Discretion When It Denied Appellants' Motion For Additional Discovery

The district court denied Appellants' motion for further discovery pursuant to Federal Rule of Civil Procedure 56(f) without adequately considering the basis

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[35] The DEA agents fraudulently used the California medical license number of an actual physician. ER 177. Checking a physician's license number is Appellants' only method of verifying a physician's medical credentials. ER 2983. If Appellants cannot verify the physician's California license number, the applicant is rejected. ER 2983.

for this additional discovery. Rule 56(f) requires "the party seeking additional discovery to proffer sufficient facts to show that the evidence sought exists, and that it would prevent summary judgment." *Nidds v. Schindler Elevator Corp.*, 113 F.3d 912, 921 (9th Cir. 1996) (citations omitted). Appellants sought additional discovery for five reasons: (1) to cross-examine the agents whose testimony provided the basis for the government's claim that Appellants had violated the CSA; (2) to support Appellants' potential entrapment and mistake-of-law defenses; (3) to gather evidence regarding the scientific basis for the government's ban on the medical use of cannabis; (4) to demonstrate the government's unclean hands; and (5) to support Appellants' claim that the solely intrastate cultivation, distribution, and consumption of medical cannabis does not substantially affect interstate commerce. ER 3262-63.

The district court summarily dismissed Appellants' motion. ER 4410. In so doing, the lower court made the circular argument that Appellants "have not explained why the agents' personal recollection of buying marijuana is suspect." ER 4410. The Court also stated that it was "unpersuaded that discovery into the government's history with respect to marijuana research will produce evidence legally relevant to the issues presented by the government's motion for summary judgment." ER 4410.

The district court was wrong. The requested discovery bore directly on *every* legal issue presented by the government's motion for summary judgment, and should have been granted. *Wichita Falls Office Assocs. v. Banc One Corp.*, 978 F.2d 915, 919 n.4 (5th Cir. 1992) ("'[C]ontinuance of a motion for summary judgment for purposes of discovery *should be granted almost as a matter of course*' . . . .") (citation omitted; emphasis added).

VI. THE DISTRICT COURT ABUSED ITS DISCRETION IN GRANTING PERMANENT INJUNCTIVE RELIEF

A. Because The CSA Is Unconstitutional As Applied, The Order Granting A Permanent Injunction Was Improper

One of the mandatory prerequisites to a permanent injunction is "actual success on the merits." *Walters v. Reno*, 145 F.3d 1032, 1048 (9th Cir. 1998); *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549, 558 (9th Cir. 1990). In its brief discussion of this requirement, the district court summarily concluded that "the clubs distributed marijuana in violation of the [CSA]." ER 4433-34.

The constitutional issues discussed in §§ I-IV *supra* precluded entry of a summary judgment and the permanent injunction, because the government could not establish success on the merits without prevailing on these issues. The government also was required to demonstrate a likelihood of prevailing on any affirmative defense, in addition to its case in chief. *See A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1015 n.3 (9th Cir. 2001), *aff'd*, 284 F.3d 1091 (9th Cir. 2002). Appellants provided the district court with detailed, uncontroverted evidence establishing the validity of their legal defenses. ER 2888-3157, 3261-4057. *See* § V.B *supra*. The presence of uncontroverted evidence of Appellants' defenses provided ample grounds for a finding that the government had not established "actual success on the merits."

B. Ignoring The Mandate Of The Supreme Court, The District Court Failed To Properly Consider The Advantages And Disadvantages Of Injunctive Relief As A Method Of Enforcing The CSA

The Supreme Court opinion in this case directed the district court to exercise its discretion in deciding whether to issue an injunction: "Because the District Court's use of equitable power is not textually required by any 'clear and valid legislative command,' the court did not have to issue an injunction." *OCBC*, 532 U.S. at 496. The Supreme Court specifically directed the district court to consider

"the advantages and disadvantages of 'employing the extraordinary remedy of injunction,' *Romero-Barcelo*, 456 U.S. at 311, over the other available methods of enforcement." *OCBC*, 532 U.S. at 498. Ignoring this mandate, the district court did not even address Appellants' motion to modify or dissolve the preliminary injunction. ER 4404-15, 4433-41. As a result, the district court abused its discretion in failing properly to weigh the impact of injunctive relief on Appellants, including deprivation of: (1) the procedural safeguards to which they would be entitled in a criminal prosecution; and (2) an immunity defense.

1. Injunctive Relief Deprived Appellants of the Procedural Safeguards to Which They Would Be Entitled in a Criminal Prosecution

The government's choice of civil injunctive relief rather than criminal prosecution deprived Appellants of important procedural protections to which they would be entitled in a criminal prosecution. The CSA is a federal *criminal* statute. *See* 21 U.S.C. § 841(b). Despite the wide range of criminal penalties at the government's disposal, it chose to enforce the statute's provisions by requesting injunctive relief. *See id.*; ER 1-31. Equitable proceedings deprive defendants of the procedural protections attendant with a criminal prosecution. For example, in a criminal proceeding, Appellants would be entitled to confront all witnesses against them pursuant to the Confrontation Clause of the Sixth Amendment. *See* U.S. CONST. amend. VI.[36] Furthermore, the type of relief sought deprived Appellants of

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[36] The deprivation of Appellants' right to confront the witnesses against them is particularly egregious under the circumstances of this case. The sole evidence supporting the district court's grant of summary judgment against Appellants was a series of declarations from undercover DEA agents who had infiltrated OCBC, pretending to be patients and equipped with forged physicians' recommendations. As discussed *supra* in § V.D the district court denied Appellants' request to cross-examine these witnesses and/or conduct further discovery. ER 4410. Had Appellants been prosecuted criminally, the agents would have been subject to full cross-examination under the Confrontation Clause.

the benefit of the higher burden of proof on the government, which must prove guilt "beyond a reasonable doubt" in all criminal cases. *See United States v. Gaudin*, 515 U.S. 506, 509-10 (1995); U.S. CONST. amends. V, VI, XIV.

Most importantly, the injunction deprived Appellants of their constitutional right to a trial by jury. *See* U.S. CONST. art. III, § 2, cl. 3; U.S. CONST. amend. VI. Summary judgment resolved all of the government's complaints, without a trial on the merits, by a jury or otherwise. ER 4404-15. Additionally, over their objections, Appellants were held in contempt in a summary proceeding without a jury trial or even an evidentiary hearing. ER 1812-26.

Given the importance of the right to a jury trial, the district court had a duty to carefully exercise its discretion to consider whether a civil injunction was the appropriate means of enforcement. *See Development in the Law — Injunction, The Changing Limits of Injunctive Relief*, 78 HARV. L. REV. 996, 1004 (1964-1965) (citing cases); *Codispoti v. Pennsylvania*, 418 U.S. 506, 515 (1974) ("[T]he jury-trial guarantee reflects a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the government.") (internal quotations omitted).[37]

2. Injunctive Relief Deprived Appellants of an Immunity Defense

The district court also failed to consider the fact that permitting the government to pursue injunctive relief deprived Appellants of the immunity to which they

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[37] The district court also failed to recognize that because an adequate legal remedy at law exists, injunctive relief was improper. "As a general rule, courts [] are reluctant to issue injunctions against the commission of a crime . . . ." 11A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2942, at 70-71 (2d ed. 1995); *Florida v. Seminole Tribe of Fla.*, 181 F.3d at 1237, 1244 n.10 (11th Cir. 1999).

are otherwise entitled under 21 U.S.C. § 885(d). *See* § V.B.1 *supra*. Section 885(d) immunizes from civil and criminal liability duly authorized state and local government officers who are engaged in the enforcement of laws relating to controlled substances. In denying Appellants' motion to dismiss based on Section 885(d), the district court interpreted Section 885(d) to provide immunity only against civil or criminal liability, and not against a suit for equitable relief. ER 1174. The district court gave no weight to the fact that the government's choice of a civil remedy deprived Appellants of this defense.

3. The District Court Failed to Consider Whether the Public Interest Was Served by Issuing the Permanent Injunction

The Supreme Court's opinion required that the district court consider whether the public interest is best served by the extraordinary remedy of injunction or by other enforcement mechanisms. The district court failed to do so here. As recognized by the Supreme Court ". . . . Congress's resolution of the policy issues [in the CSA] can be (and usually is) upheld without an injunction." *OCBC,* 532 U.S. at 497. In light of the severe disadvantages that Appellants faced in the civil injunction proceedings, and in light of the fact that an injunction is not necessary to further the true purpose of the CSA — prohibiting interstate trafficking in illicit drugs — the district court should have considered whether Californians are best served by permanently enjoining conduct expressly sanctioned by California law.

C. The District Court's Order Requiring Declarations Concerning Appellants' Intention to Violate the Injunction Was Legally Insufficient to Support a Finding of Future Non-Compliance

The district court improperly attempted to have Appellants make the government's case by requiring Appellants to submit declarations disavowing their intent to distribute cannabis in the future. ER 4415, 4435. In a hearing on

April 19, 2002, the court asked counsel for OCBC for "an assurance that if I don't issue an injunction you won't continue to dispense marijuana." ER 4372-73. Thereafter, in its order granting summary judgment, the district court instructed Appellants "to file further submissions with the court concerning the likelihood of future violations of the Act, and in particular, whether there is a threat that defendants, or any of them, will resume their distribution activity if the court does not enter a permanent injunction." ER 4415. In short, the district court ordered Appellants to submit evidence to satisfy the government's burden of proof concerning the threat of future violation.

On May 22, 2002, Appellants formally objected to this request, on the grounds that the submissions would violate Appellant Jeffrey Jones's Fifth Amendment rights and would improperly compel communications protected by the attorney-client privilege. ER 4416-17. Despite these objections, Appellants' failure to submit an affirmative statement that they would not distribute medical cannabis formed the evidentiary basis for the court's permanent injunction order, apparently satisfying the "future violations" prong of the test for a permanent injunction. ER 4435. In the context of this case, the district court's unorthodox procedure was clearly inappropriate.

The district court's procedure violated Appellant Jeffrey Jones's Fifth Amendment rights. ER 4417. The Fifth Amendment privilege against self-incrimination is available in civil proceedings. *See United States v. Balsys*, 524 U.S. 666, 672 (1998) (noting that the privilege can be asserted in any type of proceeding, "civil or criminal, administrative or judicial, investigatory or adjudicatory") (citation and internal quotations omitted); *United States v. Bodwell*, 66 F.3d 1000, 1001 (9th Cir. 1995).

In this case, Appellant Jones had a "reasonable apprehension" that if he submitted a declaration as required by the court, or if he failed to submit one, his

answer, or non-answer, might tend to incriminate him. *See Hoffman v. United States*, 341 U.S. 479, 486-88 (1951) (allowing invocation of the privilege where disclosure would serve as a "link in the chain of evidence" of criminal activity); *Doe ex rel. Rudy-Glanzer v. Glanzer*, 232 F.3d 1258, 1263 (9th Cir. 2000). Any distribution of cannabis in violation of the CSA could result in simultaneous civil contempt and criminal proceedings. Thus, Jeffrey Jones's fear of criminal charges was not only "reasonable," it was very real.

The "further submissions" requested in the May 3, 2002 Order also required the disclosure of privileged discussions between Appellants and their counsel. As defined by the Supreme Court, "[c]onfidential disclosures by a client to an attorney made in order to obtain legal assistance are privileged." *Fisher v. United States*, 425 U.S. 391, 403 (1976). Communications between an attorney and his or her client are confidential if they relate to litigation strategy. *See In re Grand Jury Witness (Salas and Waxman)*, 695 F.2d 359, 362 (9th Cir. 1982). The district court ordered a conversation about whether or not Appellants intended to obey the injunction and ordered counsel to disclose that conversation. ER 4415. The intention to violate the Order and the attendant decision whether or not to file a submission are matters of litigation strategy. The district court abused its discretion insofar as it compelled Appellants' counsel to instigate a privileged conversation and then compelled the disclosure of that communication to the court.

D. The Government Failed To Demonstrate Irreparable Harm

The district court based its finding of irreparable injury upon the passage of the statute itself, holding that it supplants any requirement of an affirmative showing of irreparable injury. ER 4434. The case relied upon by the district court, *Miller v. California Pac. Med. Ctr.*, 19 F.3d 449, 459 (9th Cir. 1994), is distinguishable. In *Miller*, this Court noted that where the statutory violation is disputed and not expressly conceded, a party is not relieved of its "burden of showing that

the statutory conditions are met." *Id.* In the present case, Appellants dispute the statutory violation. The government's failure to produce any evidence of irreparable injury should have precluded issuance of the permanent injunction. ER 4167.

The district court also failed to balance the hardships. ER 4433-41; *Romero-Barcelo*, 456 U.S. at 312. Appellants have already suffered hardship by being deprived of the constitutional protections of the criminal justice system. They will suffer the same harm in any subsequent contempt proceedings, in which they may be subject to imprisonment without a jury trial. *See Shillitani v. United States*, 384 U.S. 364, 365 (1966) (jury trial not constitutionally required in civil contempt proceedings). Appellants submitted substantial evidence of the medical hardships to be suffered by patient-members if the injunction continues. ER 1827-904, 2945-49, 2966-67, 2969-71, 2973-75, 2977-79, 3045-46, 3048-50, 3750-54, 3758-59, 3886-87. Numerous patient-members suffer from AIDS, cancer, glaucoma, and other serious illnesses for which cannabis is the only operative treatment for pain and such conditions as loss of appetite that could otherwise lead to death, blindness, or other permanent debilitation. ER 2945-49, 2966-67, 2969-71, 2973-75, 2977-79, 3045-46, 3048-50, 3750-54, 3758-59, 3886-87.

The injunction is a blanket prohibition against any patient-member receiving medical cannabis. ER 4442-47. Such relief could never have been achieved in a criminal trial. Inflicting immediate and life-threatening medical hardships on patient-members surely offends the public interest. Furthermore, the district court made no mention of the fact that issuance of a permanent injunction frustrates the intent of the majority of California voters, of the State of California itself, and the City of Oakland. ER 4433-41.

E. The Government's Unclean Hands Prevented Entry Of A Permanent Injunction

Abundant evidence of the government's unclean hands presented to the district court established Appellants' equitable unclean hands defense. If the government seeks equity, it must do equity. *See E.E.O.C. v. Recruit U.S.A., Inc.*, 939 F.2d 746, 752 (9th Cir. 1991) (the doctrine that "one who seeks equity must come to the court without blemish" applies to the government as well as to private litigants). The district court failed to consider any of this evidence.

First, because cannabis is a Schedule I drug under the CSA, only the government itself has access for the purpose of conducting experiments. *See* 21 U.S.C. §§ 812, 823(f).[38] To date, the government has wielded this power unfairly. As Appellants' evidence established, the government has placed serious obstacles in the path of research concerning medical cannabis. ER 3982-83. For example, the government delayed release of a study indicating that rats and mice that are given cannabis have fewer tumors and live longer. ER 3981. There are also no clinical studies into areas in which cannabis may be a cure, *e.g.*, the prevention of seizures and the destruction of human gliomas. ER 3981-82. Although studies are underway in other countries, no studies are underway in the United States, despite evidence that cannabis has painkilling properties and can ameliorate multiple sclerosis. ER 3981-82. The government also has made it difficult for researchers to conduct studies and suppressed research unfavorable to

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[38] The categorization of cannabis as a Schedule I drug in the first instance implicates an abuse of government power in the face of abundant facts regarding its medicinal properties. The recently released "Nixon tapes" concerning the Shafer Commission and its recommendation to decriminalize cannabis reveal that the government's scheduling of cannabis was based on the irrational prejudices of then-President Nixon rather than on factual findings. ER 4285-4316. The tapes also reveal that the President exercised undue influence over Governor Shafer in an unsuccessful attempt to preclude "unfavorable" findings. ER 4285-4316.

its position against cannabis use (ER 3776, 3982-83). For example, in 1983, William Pollin, the Director of the National Institute on Drug Abuse, directed librarians nationwide to purge their shelves of purportedly "outdated" materials concerning cannabis studies that were "misleading" and led to "equivocal results." ER 4279-83.

Finally, Appellants presented extensive evidence of numerous and uncontroverted scientific studies establishing the medical efficacy of cannabis. ER 937-39, 3261-745, 3762-3879. The government submitted no evidence to contravene this showing. ER 3171-218, 4123-4270. For these reasons, the government was not entitled to a permanent injunction.

VII. THE DISTRICT COURT ERRED IN DENYING APPELLANTS' MOTION TO DISMISS FOR LACK OF JURISDICTION BECAUSE THE CSA IS UNCONSTITUTIONAL AS APPLIED UNDER THE COMMERCE CLAUSE

In its May 13, 1998 opinion denying Appellants' motion to dismiss for lack of jurisdiction, the district court incorrectly concluded that the CSA is a constitutional exercise of Congress's power under the Commerce Clause to regulate the conduct at issue here — the wholly intrastate distribution of medical cannabis to seriously ill Californians pursuant to state law. ER 661-64. For the reasons stated in §§ I-IV *supra*, which are incorporated herein by reference, the district court erred.

VIII. THE DISTRICT COURT ERRED IN DENYING APPELLANTS' MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

A. The District Court Erred In Denying Appellants' Claim Of Statutory Immunity

In its September 3, 1998 order denying Appellants' motion to dismiss, the district court ruled that Appellants are not entitled to the immunity provided by 21 U.S.C. § 885(d). ER 1172-75. For the reasons stated in § V.B.1 *supra*, which

are incorporated herein by reference, the district court erred in rejecting Appellants' claim of statutory immunity.

B. The CSA Is Unconstitutional As Applied Under The Fifth And Ninth Amendments

For the reasons stated in § IV *supra*, which are incorporated herein by reference, the district court erred in holding that the CSA is not unconstitutional as applied under the Fifth and Ninth Amendments. ER 1172.

IX. CONCLUSION

For all of the foregoing reasons, Appellants respectfully request that the district court's orders be reversed.

Dated: November 18, 2002

MORRISON & FOERSTER LLP

By: [signature]
Annette P. Carnegie

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), Appellants hereby certify that their Opening Brief is prepared in proportionately spaced Times New Roman typeface in fourteen point.

The brief, excluding this Certificate of Compliance, the cover page, the Table of Contents, the Table of Authorities, the Statement of Related Cases, the Corporate Disclosure Statement, and the Proof of Service, contains 24,627 words based on a count by the word processing system at Morrison & Foerster LLP. Because the brief exceeds the 14,000 word limit, a motion to file a brief in excess of the type-volume limitation was filed with this Court on November 18, 2002.

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, Appellants state that there are currently two pending related cases:

1. No. 02-16335
2. No. 02-16715

The parties are in the process of requesting that these actions be consolidated.

PROOF OF SERVICE BY OVERNIGHT DELIVERY
(CCP 1013c, 2015.5)

I declare that I am employed with the law firm of Morrison & Foerster LLP, whose address is 425 Market Street, San Francisco, California, 94105; I am not a party to the within cause; I am over the age of eighteen years and I am readily familiar with Morrison & Foerster's practice for collection and processing of correspondence for overnight delivery and know that in the ordinary course of Morrison & Foerster's business practice the document described below will be deposited in a box or other facility regularly maintained by United Parcel Service or delivered to an authorized courier or driver authorized by United Parcel Service to receive documents on the same date that it is placed at Morrison & Foerster for collection.

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DECLARATION OF ANNETTE P. CARNEGIE IN SUPPORT OF APPELLANTS' MOTION FOR LEAVE TO FILE A BRIEF EXCEEDING THE TYPE-VOLUME LIMITATION OF FEDERAL RULE OF APPELLATE PROCEDURE 32(A)(7)(B)

APPELLANTS' OPENING BRIEF

EXCERPTS OF RECORDS

on the following by placing a true copy thereof enclosed in a sealed envelope with delivery fees provided for, addressed as follows for collection by United Parcel Service at Morrison & Foerster LLP, 425 Market Street, San Francisco, California, 94105, in accordance with Morrison & Foerster's ordinary business practices:

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Executed at San Francisco, California, this 18th day of November, 2002.

Lisa Sangalang
(typed)

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